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In The

Supreme Court of the United States

October Term, 1976

No.

DAVID WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, David Walker, respectfully prays that a writ of certiorari issue to review the order entered in this proceeding on June 22, 1977 by the United States Court of Appeals for the Second Circuit. This case presents important questions of the petitioner's rights under the Fifth Amendment to the United States Constitution and the doctrine of *Brady v. Maryland,* 273 U.S. 83 (1963) as well as the Jencks Act (18 U.S.C. §3500) and the Federal Rules of Evidence.

SUMMARY OF PETITION

This petition seeks review of the Second Circuit's affirmance of the petitioner's conviction before the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, and a jury, which verdict was returned on January 7, 1977. The petitioner was convicted of both counts of a two-count indictment charging violations of 18 U.S.C. §§371 and 1709. This Court is asked to issue a writ of certiorari to the Second Circuit Court of Appeals in consideration of two basic issues:

(1) Whether the prosecution's knowing suppression of exculpatory evidence, after demand, deprived petitioner of a fair trial and due process; and

(2) Whether the prosecution's failure to turn over the primary case agent's grand jury testimony constituted sufficient grounds for a mistrial.

OPINIONS BELOW

The Second Circuit issued no opinion below but rather affirmed the conviction upon completion of oral argument. The order of affirmance is unreported and reprinted in the Appendix hereto (1a)[1]. On July 8, 1977, the same panel of the Second Circuit (Mulligan, Gurfein and Van Graafeiland, Justices) denied petitioner's application for a stay of the issuance of the mandate pending filing of this petition (2a).

JURISDICTION

This petition arises from the judgment of conviction of petitioner in the United States District Court for the Eastern

1. References denoted "a" refer to Appendix, *infra*; references denoted "Tr" refer to Trial Transcript; references denoted "GJ" refer to Grand Jury Minutes; references denoted "SM" refer to Sentencing Minutes.

District of New York. A timely appeal was taken to the United States Court of Appeals for the Second Circuit. The judgment of conviction was thereafter affirmed by the Second Circuit. This petition is being filed within 30 days of the affirmance of the judgment of conviction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the intentional withholding of clearly exculpatory material by the government from the defense resulted in a deprivation of due process.

2. Whether the court erred in refusing to consider statements of eleven jurors which support the petitioner's claim of materiality of the withheld *Brady* material.

3. Whether the petitioner's right of confrontation and the search for the truth were impeded by the government's suppression of relevant Jencks Act material of its witness, Postal Inspector Edmond H. Mullins.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

18 U.S.C. §371.

"Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such

conspiracy shall not exceed the maximum punishment provided for such misdemeanor." June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. §1709.

"Theft of mail matter by officer or employee.

Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or of the Postal Service; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both." As amended Aug. 12, 1970, Pub. L. 91-375, §6(j)(19)(A), 84 Stat. 778.

18 U.S.C. §3500.

"Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or

inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the

trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral argument; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

As amended Pub. L. 91-452, Title I, §102, Oct. 15, 1970, 84 Stat. 926.

Federal Rules of Evidence—Rule 606(b)

"Competency of Juror as Witness

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

STATEMENT OF THE CASE

On September 22, 1975 the petitioner, David Walker ("Walker"), Helen Helton ("Helton") and Rosario Marchione ("Marchione") were employees of the United States Postal Service assigned to Building 179 of the Airport Mail Facility, John F. Kennedy International Airport. They worked the 12 a.m. to 8 a.m. shift.

Walker and Helton were at that time romantically involved. Walker, who had been employed by the Postal Service for approximately 17 years, held the position of foreman of the Foreign Section, but on September 22 was reassigned to the Registry Section to cover a co-worker who was on leave that morning.

Helton was assigned to the Registry Section which was enclosed by a floor to ceiling fence. Within the Registry Section was a valuable cage to which Helton went to retrieve incoming registered parcels that she was to assemble and place in sacks to be ultimately dispatched to the addressees. When a sack was filled she placed a "rotary lock"[2] on the sack to secure it.

Helton testified that Walker had previously spoken to her about removing a mail sack from the Registry Section.

According to Helton some time after 5:00 a.m. on September 22, 1975, Walker asked her if she had "heart". She testified that she took this to mean whether she was prepared to steal a bag of mail. She said she then placed twelve parcels of registered mail into a sack, placed a padlock-type lock on the sack (rather than the conventional rotary lock), placed the completed sack at her feet, nodded to Walker and turned her back on the sack. That was the last time she saw the sack. She

2. A rotary lock was described as a lock that registered its openings and closings in consecutive numerals.

did not see Walker remove the sack, nor did she know what was in the parcels.

Marchione testified that between 4:00 - 5:00 a.m. that morning he was in the "swingroom" (lunchroom) one floor above the work floor. Walker approached him and asked, "Do you have balls?" Marchione testified that he answered in the affirmative and then Walker said that a bag "came in on tour 3" — the shift prior to Marchione's shift[3] — and that Marchione was to go "downstairs". Marchione went directly downstairs and Walker walked back to the swingroom. Marchione went to the foreign dispatch section, where he was regularly assigned, and busied himself with his normal duties. He then "turned around" and saw Walker emerging with two dollies ("skids") containing mail sacks from the Registry Section and went over to assist him. Marchione helped Walker load the sacks onto a postal truck. Marchione could not testify as to the contents of any sacks. Walker and Marchione had not previously discussed the theft of any mail.

Helton testified that the next morning she received a large amount of cash from Walker. Similarly Marchione testified that on the following day he received $30,000 in cash from Walker. Helton and Marchione each testified that they did not know the other was involved in any theft or conspiracy.

REASONS FOR GRANTING THE WRIT

The record herein demonstrates that substantial issues having far-reaching effects are contained in this case. The petitioner was denied his right to due process and to confrontation as guaranteed by the United States Constitution. Furthermore, the doctrines of exculpatory evidence and the Jencks Act are also raised. Finally, this Court is now presented with one of the few opportunities to examine and interpret the new Federal Rules of Evidence.

3. Marchione's shift was from 12 midnight to 8 a.m.

Any one of these points would be proper for the consideration of this Court. When taken together, we submit that the issuance of a writ of certiorari is all but mandated.

I.

The prosecution's knowing suppression of exculpatory evidence, after demand, deprived petitioner of a fair trial and due process.

It became apparent at the outset of the trial that the government could not prove that the twelve parcels Helton said she put in the sack contained money — much less that there was $800,000 contained therein as charged in the indictment. Thus, the court ordered the prosecutor to refrain from mentioning to the jury any *specific* sum of money. It was thus the government's theory that it would seek to establish that there was a substantial sum of money in the parcels by showing that after September 22, 1975 (the alleged date of theft), Walker spent large amounts of cash.

The defense objected to the court's allowing proof of this type on the grounds that (1) absent any proof that there was currency in the parcels, it was speculative and not probative and (2) that it forced the defense to put in proof that Walker was a man of substance and would have the capacity, without resort to stealing, to spend substantial sums of money.

The court, however, allowed the prosecutor to show that Walker made substantial cash purchases including a $100,000 down payment on an apartment house in Queens.[4] The

4. The seller testified for the government that Walker came to the closing with a valise containing cash. The seller's attorney would not accept all that cash and requested that they go to a bank to convert the cash to a bank check. Walker and the others went to the Chase Manhattan Bank and Walker converted $100,000 in cash for a bank check. The bank provided Walker with its form which requires that such a large cash transaction be reported to IRS (Exhibit 19, 120a).

prosecutor then argued that it would be suspect for a $17,000 a year postal employee to make such a large purchase, *i.e.*, he must have stolen the money from the mails on September 22, 1975.[5]

One of the government's witnesses was Postal Inspector Edmond H. Mullins, who was the Walker case agent[6] and sat alongside the prosecutor throughout the trial. Mr. Mullins testified about his activities relative to the investigation of Walker and the theft of September 22 (Tr357-372, 391-421).

On cross-examination the following occurred:

> "Q. Did you receive any information from any of the banks that Mr. Walker did business with? A. Yes, I did.
>
> MR. ROSEN (defense counsel): May have that, please, Mr. Scotti?
>
> MR. SCOTTI: Do you want the information?
>
> MR. ROSEN: I want whatever you've got, yes." (Tr398).

The prosecutor did not turn over to the defense the bank/IRS form reporting the $100,000 cash transaction to IRS (Exhibit 19 for iden. 120a).

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5. "Where did he get the money, ladies and gentlemen?" (Prosecutor's summation, Tr532).

6. Mullins testified on direct examination that the "case agent is the postal inspector to whom the investigation is assigned, the person responsible for coordinating the entire investigation" (Tr357).

For the sake of continuity we will set forth, in sequence, the following events which led to the discovery of Exhibit 19, *id.*

During the jury's two day deliberation the prosecutor informed defense counsel that Inspector Mullins' grand jury testimony was not turned over to the defense (Tr419).[7] Upon reading the material it was discovered, among other things, that Inspector Mullins had testified before the grand jury concerning his investigation of Walker's $100,000 cash purchase of the apartment house. The defense moved for a mistrial based on the nondisclosure, but the motion was denied (Tr699). Instead, outside the presence of the still deliberating jury, the court directed defense counsel to "cross-examine" Inspector Mullins as if he were still on the stand and with defense counsel now in possession of the Inspector's grand jury testimony (Tr641).

Inspector Mullins was confronted with the following grand jury testimony:

> "Q. [by Mr. Scotti] Now, was there any record that you discovered during the course of your investigation which would indicate the amount of cash which David Walker brought to the bank? A. [by Inspector Mullins] Yes, there was an IRS form filled out by David Walker indicating the amount of cash" (GJ15-16).

The following then occurred during the "cross-examination" of Inspector Mullins before Judge Weinstein:

> "Q. [by Mr. Rosen] Did you ever see that [IRS] form? A. [by Inspector Mullins] Yes.
>
> MR. ROSEN: I would have certainly gone

---

7. The nondisclosure of this 3500 material is the subject of a separate point discussed, *infra*, in Point II.

into that, your Honor, and argued most strenuously.

THE COURT: Yes, you would have. [Addressing the prosecutor:] Where is that IRS form? Why wasn't it turned over as Brady material?" (Tr673).

The prosecutor immediately produced the form from his files and it was marked Exhibit 19, for identification. The form (Tr673-674) contained Walker's correct name and address and social security number except for a questionable last digit. The prosecutor argued that the form was not *Brady* material because of the alleged erroneous last digit in the social security number. Judge Weinstein rejected that argument stating:

"No, it does not take it out of Brady. It should have been turned over." (Tr678).

The court's unequivocal finding that the document was *Brady* material is revealed in the following exchange:

"MR. SCOTTI: I don't see how it's [the] Brady. I don't see how it exculpates this defendant.

THE COURT: I believe it does." (Tr681).

Nor can there be any question that the prosecutor was aware of the fact that he had the form in his file at trial:

"THE COURT: How come you didn't use it [the form]?

MR. SCOTTI: Pardon me?

THE COURT: Why didn't you use it?

MR. SCOTTI: Why didn't I use what?

THE COURT: This evidence.

MR. SCOTTI: Well, your Honor, some things I was hoping to save for cross-examination." (Tr678).[8]

It is respectfully submitted that the IRS form was exculpatory, was known by the prosecutor to be in his file at trial and was knowingly not disclosed after defense counsel had made a demand for any information from any of the banks that Walker dealt with (Tr398).

The United States Supreme Court in *United States v. Agurs*, —U.S.—, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) sets forth various tests to be employed in determining whether there has been a denial of a fair trial where a prosecutor fails to turn over *Brady* material.

The court held that:

"Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicated accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to trial." 49 L. Ed. 2d at 352

* * *

8. If defense counsel is held to be bound by what is commonly referred to as "defense strategy" why should the prosecutor not be similarly bound by his "tactics"?

"On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." 41 L. Ed. 2d at 354.

* * *

". . . we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request [for *Brady* material] at all." 49 L. Ed. 2d at 351-352.

* * *

"It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. . . . if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 49 L. Ed. 2d at 355.

Furthermore, the Second Circuit Court has stated:

"If the prosecutor has intentionally suppressed evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. *E.G. United States v. Kahn,* 472 F.2d 272, 287 (2nd Cir.); *cert. denied,* 411 U.S. 892 (1972); *United States v. Keogh,* 391 F.2d 138, 146-147 (2nd Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a 'significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' *United States v. Rosner,* 516 F.2d 269, 273 (2nd Cir. 1975); *United States v. Scijo,* 514 F.2d 1357, 1364 (2nd Cir. 1975); *Grant v. Alldredge,* 498 F.2d 376, 380 (2nd Cir. 1974); *United States v. Miller,* 411 F.2d 825, 832 (2nd Cir. 1969)." *United States v. Morell,* 524 F.2d 550, 553 (2nd Cir. 1975).

We are faced with a situation wherein the prosecutor knowingly failed to disclose material in his possession which was unquestionably favorable to the defense. Utilizing the teachings of *Agurs* and *Morell, supra,* the conclusion is inescapable that constitutional error was committed which warrants a new trial.

The value to the defense of presenting the IRS form to the jury must be noted here.[9] While the defense portrayed Walker's actions in the post-September 22 period as being open rather than surreptitious, it would have been strenuously urged that his reporting of the $100,000 cash transaction to IRS displayed such a total lack of consciousness of guilt that the government's hypothesis that the cash had been stolen from the mails would have been seriously undermined.

Had defense counsel been able to argue this to the jury, we

9. Despite the court's expressed findings before the verdict that the form should have been turned over (Tr678) and that it was exculpatory (Tr681), immediately after the verdict was returned, Judge Weinstein, uncharacteristically did a complete turn around and held that the *Brady* argument "was without any substance at all." (Tr699).

submit that this Court could clearly find that a different verdict would have been reached in that a reasonable doubt would have been created. *United States v. Miller,* 411 F.2d 825 (2nd Cir. 1969).

Defense counsel reiterated this argument in the post-trial motion to set aside the verdict. Furthermore the statements of eleven jurors were presented to the trial court (136a-148a).[10] These statements revealed that had the IRS form been made known to them, even the stricter test of *Agurs* would have been met in that the evidence would have been of such substance as to create a "reasonable doubt" as to the appellant's guilt. 49 L. Ed. 2d, *supra,* at 354-355. It is to be noted again, however, that under the authority of the Second Circuit, "a new trial is warranted if the evidence is merely material or favorable to the defense," *(Morell, supra)* if the prosecutor was aware of such highly probative material.

The jurors' statements indicated that had they known of the form, (a) it *would* have made a difference in the deliberations and verdict of six jurors; (b) it *might* have made a difference in the deliberations and verdict of four jurors; and (c) it *could* have made a difference in the deliberations and verdict of one juror. In *Agurs,* this court held that:

> "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 49 L. Ed. 2d at 355.

In the instant case, the entire testimony took three trial days

10. In order to insure openness an application had been made to Judge Weinstein to examine the jurors.

while the jury deliberated two days.[11] Clearly the jury was not overwhelmingly convinced of the petitioner's guilt. We submit that had the defense been able to present the IRS form to the jury whether the court applied the "reasonable doubt" standard of *Agurs* or the "material and favorable" standard of *Morell,* the result would have been different.

As stated above, the statements of eleven jurors were presented to Judge Weinstein who rejected them under the theory of Rule 606(b) of the Federal Rules of Evidence:

> "(b) Inquiry into validity of verdict or indictment. *Upon an inquiry into the validity of a verdict* or indictment, a *juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith,* except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (Emphasis supplied.)

We submit, however, that consideration of these statements by the jurors is in no way violative of Rule 606(b). The rule is directed toward preventing an invasion into the jury room to ascertain on what basis a defendant is convicted or what may have led a jury to convict. As the rule states, a juror may not

11. in *Agurs,* the jury was out about 25 minutes.

testify as to his "mental process" in arriving at a verdict. There is nothing in this case to suggest that this is what the appellant is trying to do. What in fact was shown was that the failure of the government to provide the form to the defense did result in a denial of due process and that the petitioner, in all likelihood, would not have been convicted had this information been imparted to the jury.

> "The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence, rather, it is also to make the trial a search for truth informed by all relevant material, much of which, because of the imbalances in investigative resources, will be exclusively in the hands of the government." *United States v. Bryant,* 439 F.2d 642, 648 (D.C. Cir. 1971).

The failure to disgorge the IRS form was constitutional error which denied petitioner a fair trial.

II.

The prosecution's failure to turn over the primary case agent's grand jury testimony was grounds for a mistrial.

On the morning of the second day of jury deliberation the prosecutor delivered to defense counsel for the first time a copy of Agent Mullins' grand jury testimony (GJ1-19). Mullins, the case agent, had been called as a government witness. We submit that the prosecutor's failure to properly turn over such testimony and the trial court's refusal to grant a mistrial constitutes reversible error. The court sternly rebuked the prosecutor, stating that such procedure was to gain "tactical advantage" and evidenced "sharp practice by the Government." (Tr634).

Instead of granting the mistrial, the court directed counsel to cross-examine Agent Mullins outside of the presence of the jury to see of what use the 3500 material could have been. Had counsel been able to employ this material before the jury, the following would have been shown:

A. At GJ11-12 of Mullins' grand jury testimony, he testified that the parcels came to rest in the registry room at "4:30 in the morning of September 22, 1975." Without question, the defense would have brought before the jury the fact that the exact arrival time of the parcels was ascertained to be 4:30 a.m.

Records of the post office revealed that Walker had gone to lunch between 4:00-4:30 a.m. on September 22, 1975; Helton and Marchione between 4:32-5:02 a.m.

Marchione testified that Walker came up to the swingroom "between 4:00 and 5:00 in the morning" apparently to elicit Marchione's aid in committing the theft. Helton testified "Dave came over to [me] in the morning, *after lunch* and asked me if I had heart, this was some time after 5 o'clock" (Emphasis added.)

Had the defense been apprised of the fact that Inspector Mullins had ascertained the exact time the parcels arrived in the registry room, the defense would have argued to the jury: (1) the parcels came in at the time Walker was returning from lunch and Marchione and Helton were leaving for lunch; (2) Walker could not have known that Helton would have been able to make up her bag until *after* she returned from lunch at 5:02, thus it would be improbable that Walker went up to see Marchione in the swingroom while Marchione was on his lunch hour between 4:32-5:02. In other words, until he knew that Helton "had heart," he wouldn't enlist Marchione's aid; (3) additionally, the defense would have argued to the jury that since the parcels did not arrive until 4:30 it would have been impossible for the crime to have been committed as Marchione testified. He said

Walker went up to the swingroom between 4-5. Since Marchione was in the swingroom on his lunch break (4:32-5:02 a.m.) the documentation shows that Walker could not have been upstairs during that period of time.

The record reveals that when employees go to lunch they punch in and out. Marchione testified that when anybody on the first floor goes upstairs to the swingroom, they have to punch out. The records of time worked show clearly that Walker did not punch out after he returned from lunch at 4:30. In other words, if the parcels came in at 4:30 (the exact time Walker returned from lunch) and if he in that instant discovered their arrival, he would have had to punch out to go upstairs to the swingroom to enlist Marchione's aid.

Thus, the defense would have projected these arguments to the jury in an attempt to strike directly at the witness' story of how the crime occurred. We submit that those arguments are sufficient to raise a reasonable doubt as to petitioner's guilt.

B. At p. GJ10 of Inspector Mullins' testimony before the grand jury the following occurred:

> "Q. [by Mr. Scotti] Were these registered parcels? A. [by Inspector Mullins] These were *insured* parcels coming into the United States. The procedure at Kennedy Airport is that insured parcels from Italy are entered to the registry section." (Emphasis added.) See, also, GJ10 of grand jury testimony of Inspector Mullins of August 17, 1976.

After the grand jury testimony had been furnished to the defense and the court directed cross-examination of Inspector Mullins it was established that *in fact* we were not dealing with registered parcels at all, but with insured parcels. It then became

known that a Mrs. Samuels was the postal employee specifically assigned to open insured mail bags (Tr640):

> "Q. [by Mr. Rosen] Let me ask you this, again, Inspector. Isn't it a fact that the person in Kennedy Airport, building 179 who handles insured parcels of high value . . . makes up his own mail sack as opposed to somebody in the registry room like Helen Helton? A. [by Inspector Mullins] It can be done if it's recognized as high value. Sometimes they do not make these dispatches." (Tr642).

Although Inspector Mullins insisted that insured parcels of high value from Italy are treated like registered mail — a fact which we would have contested — the record reveals that: (1) the trial concerned the handling of *registered* mail; (2) Helton testified that she would obtain *insured* parcels "at a certain time of day"; (3) postal employees Horowitz and Campbell were the only people who determine valuables.

Thus, had Inspector Mullins' grand jury testimony been furnished to the defense during the trial, instead of after the trial, the defense would have called Mrs. Samuels to contradict the government's argument and witnesses in their position that registered and insured mail from Italy are handled in the same way and the defense would have argued to the jury:

(1) Helton did not make up the parcels allegedly stolen;

(2) These insured parcels allegedly from banks would have gone to Mrs. Samuels, not employees Horowitz or Campbell;

(3) Insured parcels determined to be of high value would have been dispatched by Mrs. Samuels *out of the vault* area directly to a convoy and not passed on to Helton; and thus

(4) Helton's testimony was false and should have been known to be such by the government.

We respectfully submit that the above arguments would have been vital to the defense to have impeached Helton's testimony and to have argued that the crime charged could not have happened. The failure to disclose that information which was contained in Mullins' grand jury testimony deprived Walker of a fair trial.

It also bears repeating that had Mullins' grand jury testimony been turned over after his direct examination, the defense would then have learned of the existence of the IRS form.

The court found that the failure to turn over the testimony was not inadvertent.[12]

Upon motion for a new trial at the time of sentencing, the court found that the post-summation cross-examination of Agent Mullins revealed nothing helpful to the defense primarily because the petitioner was an "extremely experienced supervisory employee" (SM7), thus reasoning that Walker knew what Mullins had unearthed in his investigation. There is nothing in the record to support this conclusion. Walker, it must be noted, on the morning in question, was not assigned to his

12. "MR. SCOTTI: For the record, there is no question about the fact that I should have given Mr. Rosen the Grand Jury testimony of Mr. Mullins. There is no question about that. I was wrong . . . . I do take exception to your Honor's characterization of it as a tactic. It was not done intentionally. It was not done willfully. It was not done with any intent to gain any kind of advantage. It was completely inadvertent because of the circumstances of what was going on at the time.

THE COURT: I don't agree." (Tr684-685).

normal post, but had replaced the supervisor in the Registry Section, who was absent on annual leave.

A new trial should have been granted to permit defense counsel to cross-examine Agent Mullins as to his grand jury testimony and to allow Mrs. Samuels to be called to show that *insured* mail could not have been removed the way the government suggested.

In effect, the trial court withheld the 3500 material by denying defense counsel the opportunity to employ it before a jury. The trial court may not withhold 3500 material by determining that statements contained therein are consistent with a witness' testimony. Whether such statements tend to impeach a government witness is within the province of the defense to decide. *Banks v. United States,* 348 F. 2d 231 (8th Cir. 1965); *United States v. McCarthy,* 292 F. Supp. 937 (S.D.N.Y. 1968). The law in the Second Circuit is clearly inapposite of what Judge Weinstein determined at the time of trial.

> "The 1970 amendment to the Jencks Act, 18 U.S.C. §3500(e)(3), which codified this Court's holding in United States v. Youngblood, 379 F.2d 365 (2nd Cir. 1965), entitles a defendant to the grand jury testimony of a government trial witness without any preliminary inspection for usefulness by the trial judge." *United States v. Ramirez,* 482 F.2d 807, 813 (2nd Cir. 1973), *cert. denied.,* 414 U.S. 1070.[13]

By requiring trial counsel to demonstrate what he might

13. Although defense counsel did not move for the delivery of 3500 material as the direct testimony of each government witness was concluded, because of the practice that this material was automatically delivered throughout the trial, Judge Weinstein absolved defense counsel of the motion requirement (SM9-10).

have done with the 3500 material before a jury, not only was the trial court imposing its own mind into what a jury might have found, but also, by not permitting such information to go before the jury, severely limited the petitioner's right to confrontation as guaranteed by the Sixth Amendment.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . . [citations] to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. [citations]" *Alford v. United States,* 282 U.S. 687, 692, 51 S.Ct. 218, 75 L. Ed. 624 (1931), see also *Smith v. Illinois,* 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).

CONCLUSION

For these various reasons, certiorari should be granted to review the judgment of the Second Circuit.

Respectfully submitted,

s/ Roy Raymond John Kulcsar
SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 22, 1977

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD

HON. MURRAY I. GURFEIN

HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

United States of America,
Plaintiff-Appellee

v.

David Walker, Helen A. Helton,
Rosario H. Marchione,
Defendants

David Walker,
Defendant-Appellant. 77-1176

Appeal from the United States District Court for the Eastern District of New York.

Order of the United States Court of Appeals for the Second Circuit Dated June 22, 1977

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
by Clerk

Arthur Heller
Deputy Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of July, one thousand nine hundred and seventy-seven.

United States of America,
Plaintiff-Appellee

v.

David Walker, Helen A. Helton,
Rosario R. Marchione,
Defendants

David Walker,
Defendant-Appellant.

Order of the United States Court of Appeals for the Second Circuit

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated June 24, 1977 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is denied.

s/ Wm. H. Mulligan
William H. Mulligan

s/ Murray I. Gurfein
Murray I. Gurfein

s/ E. Van Graafeiland
Ellsworth Van Graafeiland
Circuit Judges

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

DAVID WALKER, HELEN A. HELTON and ROSARIO R. MARCHIONE,

Defendants.

Weinstein, J.
Cr. No. 76 CR 547
(T. 18, U.S.C., §§1709, 371 and 2)
8/25/76

Indictment

THE GRAND JURY CHARGES:

COUNT ONE

On or about September 22, 1975, at the Registry Section, Building 179 of the Airport Mail Facility, John F. Kennedy International Airport, within the Eastern District of New York, the defendant DAVID WALKER, while employed as a Foreman of Mails, United States Postal Service, the defendant HELEN A. HELTON, while employed as a Clerk, United States Postal Service and the defendant ROSARIO R. MARCHIONE, while employed as a Transfer Clerk, United States Postal Service, did knowingly and wilfully embezzle twelve (12) parcels of mail which came into their possession intended to be conveyed by mail, ten (10) of said parcels addressed to the Irving Trust Company, New York, New York and two (2) of said parcels addressed to the Chase Manhattan Bank, New York, New York, which parcels contained approximately Eight Hundred Thousand Dollars ($800,000.00) in United States Currency, (Title 18, United States Code, Sections 1709 and 2).

COUNT TWO

From on or about and between September 1, 1975 to May 31, 1976, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID WALKER, HELEN A. HELTON and ROSARIO R. MARCHIONE did knowingly, wilfully and unlawfully conspire and agree to commit an offense against the United States in violation of Title 18, United States Code, Section 1709 by conspiring to embezzle, steal, abstract and remove a registered mail bag containing twelve parcels of mail from the Registry Section, Building 179 of the Airport Mail Facility, John F. Kennedy International Airport, which had been entrusted to them as Postal Service employees and had come into their possession intended to be conveyed by mail.

Indictment

In furtherance of said unlawful conspiracy and to further the objects thereof, the defendants DAVID WALKER, HELEN A. HELTON and ROSARIO R. MARCHIONE did commit the following:

OVERT ACTS

1. On or about September 22, 1975, at the Registry Section, Building 179 of the Airport Mail Facility, John F. Kennedy International Airport, the defendant HELEN A. HELTON prepared a bag of registered mail containing twelve parcels.

2. On or about September 22, 1975, at Building 179 of the Airport Mail Facility, John F. Kennedy International Airport, the defendants DAVID WALKER and ROSARIO R. MARCHIONE took the bag of mail described in paragraph 1 above and placed it in a mail truck with empty mail sacks.

3. On or about September 22, 1975, within the Eastern District of New York, the defendant DAVID WALKER gave approximately Two Hundred Thousand Dollars ($200,000.00) to the defendant HELEN A. HELTON.

4. On or about September 22, 1975, within the Eastern District of New York, the defendant DAVID WALKER gave approximately Thirty Thousand Dollars ($30,000.00) to the defendant ROSARIO R. MARCHIONE.

5. On or about May 17, 1976, the defendants DAVID WALKER and HELEN A. HELTON drove from Queens, New York to Granville, New York. (Title 18, United States Code, Section 371).

A TRUE BILL

Indictment

S/ David G. Trager by TPP
DAVID A. TRAGER
United States Attorney
Eastern District of New York

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 76CR-547

Defendant: DAVID WALKER

In the presence of the attorney for the government the defendant appeared in person on this date: 3/11/77

With Counsel: Michael Rosen

There being a verdict of: Guilty.

Defendant has been convicted as charged of the offenses of violating Title 18 U.S.C. §§ 371, 1709 and 2, in that from on or about and between Sept. 1, 1975 and May 31, 1976, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant and others did knowingly conspire to embezzle a registered mail bag which had been entrusted to them as Postal Service employees, and that on or about Sept. 22, 1975, the defendant and others did knowingly and willfully embezzle twelve parcels of mail.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody

Judgment and Commitment

of the Attorney General or his authorized representative for imprisonment for a period of: 3 years on each of counts 1 and 2 to run concurrent — and fined $2,000 on count 1 and fined $10,000 on count 2 to run consecutive for a total fine of $12,000 to be paid within 30 days. Stay of execution of sentence granted pending appeal.

FILED
in Clerk's Office
J.S. District Court E.D. N.Y.
Mar 11 1977

s/ Jack B. Weinstein
U.S.D.J.
3/11/77

EXCERPTS OF TRIAL TRANSCRIPT DATED JANUARY 4-5, 1977

[Commencing at page 357]

"EDMUND H. MULLINS, called as a witness having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION
BY MR. SCOTTI:

Q. Mr. Mullins, you are a postal inspector employed by the U.S. Postal Service, are you not, sir? A. Yes, sir.

Q. Do you have any particular duty station? A. I am stationed at the airport mail facility at Kennedy Airport.

Q. Do you specialize in any particular kind of postal investigation? A. I am an internal theft specialist.

Q. Please explain what internal theft specialist means? A. I investigate crimes alleged to have been committed withing [sic] the post office.

Q. Now, you are the case agent on this case before this jury on trial, is that right? A. Yes.

Q. Will you explain to us what a case agent is? A. A case agent is the postal inspector to whom the investigation is assigned, the person responsible for coordinating the entire investigation.

[358] Q. Did there come a time, Inspector Mullins, when you met Anthony Shortt or Tony Shortt? A. Yes.

Q. When was that, sir? A. I met Anthony Shortt on September 7, 1975.

THE COURT: I would like counsel to come to the side bar. I don't know where this is going.

(Side bar discussion out of hearing of the jury as follows)

THE COURT: What do you expect to prove?

MR. SCOTTI: After he met Shortt, what action he took to explain the surveillance, to explain, Mr. Rosen is mentioning cameras, surveillance camera that nobody was surveilling --

THE COURT: No.

MR. SCOTTI: I can't bring out the fact that the cameras were not working on September 22?

THE COURT: No.

MR. SCOTTI: Will he be precluded in making that argument on summation?

MR. ROSEN: I will ask him if he saw someone.

THE COURT: You can ask him if the cameras were in operation. What else?

MR. SCOTTI: Let me get my notes. When they [359] received notificaition [sic] of the losss [sic] of these parcels.

THE COURT: No. What else?

MR. SCOTTI: It is not hearsay, it is a document kept in the normal course of business.

THE COURT: It is not relevant.

MR. SCOTTI: It is. He will argue in summation they watched him all during this

period of time. We didn't know there was a loss unitl [sic] January.

THE COURT: Are you going to argue that?

MR. ROSEN: I will argue that he was under surveillance in September.

THE COURT: You can introduce that. What else?

MR. SCOTTI: As to the fact why there was no surveillance on September 22, 1975, the day in question.

THE COURT: Why?

MR. SCOTTI: There was no surveillance because Walker was the supervisor and was only shifted over to the department because the supervisor was sick and number two, Tony Shortt was not working at the time.

THE COURT: All right. Make it brief.

MR. SCOTTI: I couldn't ask him about the surveillance?

THE COURT: No.

MR. SCOTTI: Just by way of explanation?

[360] THE COURT: Yes, just what I said.

(In hearing of the jury as follows)

BY MR. SCOTTI (Cont'd):

Q. Inspector Mullins, with regard to the loss of the 12 parcels of mail that has been discussed during this trial, when did the postal service receive notification that any of these parcels were missing? A. The case was jacketed for investigation on January 8, 1976.

Q. When — does that indicate that the postal inspectors service was notified on that date? A. It may have been notified a day earlier, but that was the date the case was jacketed. We received our notifications of losses from the Claims and Inquiry Section, then we jacketed a case.

Q. Now, were there cameras in operation, surveillance cameras in operation with the registry section on September 22, 1975? A. There were no cameras in operation at that time. The cameras were placed, but they were not in operation.

Q. Were they in working order? A. They were in working order. They required to be manually operated.

MR. ROSEN: They were or were not? [360a] A. They were in working order. They required to be operated manually, but nobody was there operating them.

Q. Did these cameras have video taping capability? A. No.

Excerpts of Trial Transcript Dated January 4-5, 1977

[361] BY MR. SCOTTI:

Q. So they could not be set on automatic? A. They have no automatic capabilities.

Q. Was any kind of surveillance being conducted of the registry section or Mr. Walker on September 2, 1975? A. No, there was not.

Q. Was there a reason for that, sir? A. The reason was that I was short of manpower and I was only conducting surveillances on the date Mr. Short [sic] and Mr. Walker were both working at that time.

Q. Was Mr. Short [sic] working on September 2nd? A. No, he was not.

Q. By the way, was Mr. Walker—where was Mr. Walker supposed to be working on September 2, 1975? A. The duty schedule called for him to be the foreman of the foreign dispatch area.

Q. Which would be outside the registry section? A. That's right.

Q. How did it come to be he was working as foreman for the registry section? A. The regular foreman of the registry section received annual leave for that day.

MR. SCOTTI: Thank you, I have no further questions.

Excerpts of Trial Transcript Dated January 4-5, 1977

[362] CROSS-EXAMINATION
BY MR. ROSEN:

Q. Mr. Mullins, you're the agent in charge of this investigation, right? A. Yes.

Q. All steps taken with Mr. Scotti and pursuant to this investigation have been done through you, is that correct? A. No, not all steps. It was a two-week period of time when I was not on the case.

A. You were on vacation? A. I was in the hospital

Q. You're stationed at Kennedy Airport, this building 159 that should be familiar to you —

MR. SCOTTI: 179.

Q. Building 179. A. It's familiar to me.

Q. You were sitting here during Mr. Marchione's testimony about the fence, am I right, that's in the yard. You see this fence (indicating)? A. Yes.

Q. How tall was that fence? A. The fence, I believe, is six feet tall, topped with three strands of barbed wire, I believe.

[363] Q. How high is that barbed wire; do you have any idea, sir? A. It's taller than the fence.

Q. Excuse me, sir? A. It's taller than the fence.

Q. The barbed wire is taller than the fence? A. The barbed wire is on top of the fence.

Q. So what are we talking about, 12 feet up in the air? A. I'm talking about approximately 8 feet high.

MR. ROSEN: Would you mark this, sir?

THE CLERK: Photo marked as Defendant Exhibit H for identification.

(So marked.)

THE CLERK: Photo marked as Defendant Exhibit I for identification.

(So marked.)

THE CLERK: Photo marked as Defendant Exhibit J for identification.

(So marked.)

MR. SCOTTI: Your Honor, I have absolutely no objection to these questions, but at this point the witness is Mr. Rosen's witness. I would respectfully request to cross-examine when he's through.

[364] MR. ROSEN: Might I be heard, your Honor?

THE COURT: You'll be permitted.

MR. SCOTTI: Thank you.

MR. ROSEN: Either way.

BY MR. ROSEN:

Q. Inspector, I show you what has been marked Defendant's Exhibit J for identification (handing witness). Can you tell us what that picture depicts? A. The picture depicts the fence which you pointed out to me in blue before on the diagram, a portion of that fence.

Q. That's the fence at the airport that you're familiar with? A. That's a portion of it, yes.

Q. Is that a portion — would you say it's a portion of the fence that's represented by this diagram right here where the witness drew the truck and put the work "truck" on the diagram? A. I can't tell from the picture whether it's the same spot or not.

Q. How about Exhibit I (handing) for identification, sir? A. Exhibit I is the portion of that fence, again, drawn on the diagram looking towards the old supervisors' [365] parking area into the corner of it, the upper right-hand corner.

Q. Is the fence visible in these two pictures? A. Yes, it's visible.

MR. ROSEN: I would like to move them into evidence. I'll show them to Mr. Scotti.

I would represent the pictures were taken just a couple of weeks ago. They're not back in '75.

MR. SCOTTI: I have no objection.

THE CLERK: Defendant's Exhibits J and I for identification, marked in evidence.

(So marked.)

Q. Inspector, I show you what has been marked Defendant's Exhibit H in evidence (handing). Is that a closer picture of the fence that surrounds the parameter of the airport or — the parameter, yes.

THE COURT: Perimeter.

Q. I'll represent to you that was taken at the airport. I want to know if that's the fence? A. I can't recognize from that angle. I think you're taking it by the exit guard booth over there, but I'm not certain by the angle of the picture.

Q. Is the fence uniform around the entire facility? A. To the best of my knowledge, except for the [366] gates.

MR. ROSEN: I'll move to offer that in evidence.

THE COURT: Mark it.

MR. SCOTTI: Might I see it?

(Handed to Mr. Scotti.)

THE WITNESS: I would add, that photo you're showing me is taken from a low angle.

MR. ROSEN: I'll accept that.

Q. To make it look higher? A. That's correct.

MR. SCOTTI: Might I have a voir dire, your Honor.

THE COURT: Yes.

VOIR DIRE EXAMINATION
BY MR. SCOTTI:

Q. Inspector Mullins, are you able to tell where this fence is located from this photograph (handing)? A. I don't recognize the ramp, but I haven't been at Building 179 in a couple of weeks. I have been here in Brooklyn in the process of building a new express mail unit there that may be the ramp to the new unit. I'm not certain.

THE COURT: Was that the situation at the time in question?

[367] THE WITNESS: There was a fence

there, your Honor, but I don't recognize the ramp.

MR. ROSEN: I'll withdraw that one.

THE COURT: Withdraw the offer?

MR. ROSEN: I'll withdraw.

Q. Is it fair to say, Inspector, that the fence that had the barbed wire go straight up from the ground and then that barbed wire goes off at an angle? A. Yes.

Q. That's to discourage, I guess, people from climbing over that fence. A. That's right.

MR. ROSEN: With your Honor's permission, I would like to pass these two exhibits to the jury.

THE COURT: You may.

(Said photographs were given to the jury.)

Q. Inspector, you told us on your direct examination that there were cameras that were working at this facility on September 2, 1975, am I right? A. I believe what I told you the cameras were in operating condition, but they were not working.

Q. Were there cameras up on the wall? A. There were cameras on posts within the registry room.

[368] Q. On posts. This is the registry section, right? (Indicating). A. That's right.

Q. There are posts in this section, right? A. Yes.

Q. How many posts? A. I can't tell you the number of posts in there.

A. About half a dozen?. A. About half a dozen.

Q. On the top of each of those posts were cameras? A. That's not correct. I had four cameras in the registry section.

Q. In this entire — A. In the entire registry section.

Q. Four cameras? A. One of them is on the wall. The other three are on posts.

Q. Did you have any cameras in the vault room? A. I'll be happy to show you where the cameras are if you like.

Q. That's all right, you can answer my question. A. I have one camera in the registry vault room mounted on the wall facing toward the door of the vault room.

Q. That's a total of five cameras? [369] A. No, that's a total of four cameras.

Q. Four cameras?

At these two — you say they were operational? A. They were operational.

Q. At the openings to the registry section that you see here on your diagram with the little dots here (indicating), the two exits, there were guards there, isn't that correct, on September 2, 1975? A. That's correct.

Q. Isn't it a fact, sir, that Mr. Walker was under surveillance by you and your colleagues starting in early September of 1975? A. Only during those periods of time when he worked in Building 179 at that particular time.

Q. I see. Did David Walker work in places other than 179? A. At that time? No.

Q. While he was in that building, 179, starting in early September, he was under surveillance? A. Until what period of time?

Q. Let's say until September 21. A. He was under surveillance during those periods of time when his schedule and that of Anthony Short were on.

Q. He was under surveillance at least, for some [370] period of time when he and Mr. Short were working from early September to the 21st of September? A. Yes.

Q. And then he was under surveillance at least some period of time after the 21st of September to, let's say, when, November? A. He was under surveillance longer than that.

Q. How long was he under surveillance? A. He was under surveillance until the time he was arrested, not under continuous surveillance, but under surveillance.

Q. By you personally? A. No, not by me personally.

Q. Did you supervise this surveillance of Mr. Walker? A. I supervised it at times. Another inspector supervised at other times.

Q. Was he under surveillance when he was not in the post office facility as well? A. Not at that particular period of time.

Q. What particular period of time was he under surveillance by you and your colleagues? A. I would have to see the documents.

MR. ROSEN: Let me withdraw that, please.

[371] Q. You put bugs in his car, sir? A. No, there were no bugs in his car.

Q. Did you put a little homing device so you could trail him? A. Yes, I did.

Excerpts of Trial Transcript Dated January 4-5, 1977

Q. Did you have a mail cover on him? A. Yes.

Q. Did you trail him up to the house where the money was buried? A. Yes, I trailed him to Granville, New York.

Q. When did you trail him? A. I went up in April and I believe I went up in May.

Q. Of what year, sir, '76? A. 1976.

Q. Did you open up safe deposit boxes? A. His safe deposit box was opened by Court order.

Q. Were you there? A. No.

Q. One of your associates were? A. Yes.

Q. Did you go into his house in Granville, you or your associates, sir? A. I entered his house in Granville with a search [372] warrant.

Q. I know you did. I'm not saying there's anything wrong. Did you search the house? A. Yes, I did.

Q. Were walls taken apart? A. The only item in the entire house taken apart was the ceiling of one closet.

Q. Were drawers opened? A. Yes, they were.

Excerpts of Trial Transcript Dated January 4-5, 1977

Q. Were holes dug? A. Holes were dug —

THE COURT: Excuse me, I have a conference.

Can you break now?

MR. ROSEN: Surely.

THE COURT: 9:40 tomorrow. Good night, have a pleasant evening.

Don't discuss the case.

(Jury leaves Courtroom.)

(Time noted: 4:30 o'clock p.m.)"

* * *

[Commencing at page 391]

"EDMUND H. MULLINS, having been previously duly sworn, resumed the witness stand and testified further as follows:

MR. ROSEN; May I have a minute? Some papers were turned over to me by the Government.

THE COURT: What papers?

MR. SCOTTI: Three very brief xerox papers of some notes that he hadn't found until

early this morning which I just turned over to Mr. Rosen.

CROSS-EXAMINATION
BY MR. ROSEN: (continued)

Q. Good morning, Inspector Mullins. A. Good morning.

Q. When we left off yesterday I was asking you about various activities by the postal inspectors regarding the surveillance of Mr. Walker; do you recall that? A. Yes.

Q. And just to get us back to where we were, I was also asking you about certain activities regarding the investigation of Mr. Walker? Do you recall that? A. Yes.

Q. All right. Now —

MR. ROSEN: Your Honor, I am prepared to stipulate, to save time, that what the inspectors did [392] was under Court order, so that we don't have to — the opening of Mr. Walker's safe deposit box, I will concede was done with Court order; the putting in of a bug in the car, I will concede —

MR. SCOTTI: It was not a bug, your Honor. It was a tracking device.

MR. ROSEN: I am sorry. A transmitter. That was with a Court order. The mail cover was done with a Court order. And the entrance into

Mr. Walker's home upstate and the search was done with a Court order.

MR. SCOTTI: For the record, your Honor, the mail cover did not involve a Court order. The regulations of the Postal Service and the law does not require a Court order for a mail cover. But it was obtained in the normal course with the normal authorization and approval.

THE COURT: That's just making a record of the mail he received.

MR. SCOTTI: What it entails is the Postmaster at the Post Office just records the sender of the letter and reports that and then sends the letter on. He doesn't open the letters or anything like that.

THE COURT: All right.

[393] Q. Inspector, when you — when you and your agents or associates hit Mr. Walker's safe deposit box, did you find any money in there? A. There was nothing in the safe deposit box when it was opened.

Q. Did you open it? A. No, I did not.

A. One of the people under your command opened it? A. Yes.

Q. And reported to you that there was nothing in the safe deposit box? A. That's correct.

THE COURT; Excuse me. It was literally empty?

THE WITNESS: It was empty.

Q. Did you make a report of that? A. The warrant was returned to the U.S. Magistrate that issued it.

Q. There are no reports of that, are there to your knowledge? A. I don't understand.

Q. Well, did somebody make a report to you as the agent in charge of the investigation? A. I was told by Inspector Renzulli that the box was empty.

[394] Q. There's no written report? A. It's a matter of written record on the search warrant.

Q. I don't understand that. Is there a written report? A. I don't know if it's in any written reports.

Q. To your knowledge there is no written report? A. I don't know if it's in any written report.

Q. Well, if there was a report, it would go to you as the case agent; am I right, sir? A. If there was a report written on it, I would have written it. I don't remember.

Q. Okay. What was found in the house

upstate in Granville when you and your associates broke into the house?

MR. SCOTTI: Excuse me. I have two objections.

Number one, the question is too broad. And I object to broke into the house after Mr. Rosen said it was done with a Court order.

THE COURT: All right.

MR. ROSEN: I will withdraw it.

Q. Let me ask you this. Were you up in Granville at Mr. Walker's house to search the house? A. Yes, I was.

Q. Did you forcibly enter the house by breaking a [395] lock? A. I did not.

Q. How did you get into the house? A. The lock was picked.

Q. Oh, picked the lock. But you had a Court order to do that, I understand; is that correct? A. That's correct. I had a search warrant.

Q. You have a search warrant.

By the way, were photographs taken by you or your associates of what Mr. Walker's house looked like before you started to search it and what it looked like after you started to search

it? A. There were photographs taken of the house prior to the search. The reason the photographs were taken was that there had been what appeared to be an attempted forced entry. There was a shovel on the deck of the house below a window next to the door. And it appeared as though someone had attempted to pry the window off the house with a shovel. It was an open window on the side of the house and for this reason the photographs were taken.

Q. I didn't ask you why. But there were photographs? A. There were photographs taken.

Q. May I have the photographs? A. The photographs were taken by the New York State [396] Police and I do not have the photographs.

Q. Well, were you in the house? A. Yes, I was.

Q. Were you outside the house? A. Yes, I was.

Q. Did you supervise the search? A. Yes, I did.

Q. Did you supervise the taking down of the ceiling panels? A. I took down the ceiling panels myself.

Q. You took it down yourself.

Did you do any digging in the house? A. Yes.

Q. Around the side of the house? A. There was digging done around the outside of the house.

MR. ROSEN: I'm afraid I'll have to mark these, your Honor, for identification.

THE COURT: Well, what are they?

MR. ROSEN: Pictures of the house. I represent they are pictures of the house.

THE COURT: All right. Put them all in one envelope. Mark them in evidence.

Q. After the search —

[397] THE COURT: You understand, we are not trying the agents here to determine whether they conducted the search in a proper way.

MR. ROSEN: I am not making any claim that they didn't your Honor. I am not making that claim.

THE CLERK: Defendant's Exhibit V marked in evidence and placed in a brown envelope.

(So marked.)

MR. SCOTTI: Marked in evidence, your Honor?

THE COURT: Yes.

MR. SCOTTI: May I see them, please?

THE COURT: Certainly.

Q. What I am — what I am trying to do is determine the extensiveness of the search. I am not claiming that you did anything illegal, but how extensive was the search of Mr. Walker's house and the surrounding land. Would you say it was an extensive search? A. It was an extensive search of the house. The search of the land surrounding the house was not extensive.

Q. What did you find in the house that would be pertinent to your investigation of this theft? A. I found nothing in the house pertinent to this theft.

Q. As a matter of fact, Inspector, under your [398] supervision bank records of Mr. Walker were subpoenaed; isn't that correct? A. That's correct.

MR. SCOTTI: Excuse me. For the record, I would object to the introduction of these photographs into evidence. We don't know when they were taken or what it relates to.

THE COURT: Well, it was taken of the house.

MR. SCOTTI: I don't know when, by whom.

THE COURT: After the search.

MR. SCOTTI: Or what the circumstances were.

MR. ROSEN: Could I have —

Q. Did you receive any information from any of the banks that Mr. Walker did business with? A. Yes, I did.

MR. ROSEN: May I have that, please, Mr. Scotti?

MR. SCOTTI: Do you want the information?

MR. ROSEN: I want whatever you've got, yes.

Your Honor, now receiving material for the first time. May I?

MR. SCOTTI: I object to this. I object to this. Mr. Rosen has never made any request for it. He waits until he's in front of the jury to make the request. The Government has made repeated requests for [399] reciprocal information which he has refused.

THE COURT: Excuse me. What are these?

MR. ROSEN: Records of information turned over by the Government from Mr. Walker and bank accounts.

MR. SCOTTI: Your Honor, this is a summary which was prepared by the Government's auditor, the postal inspector auditor of the information we received from banks. That is a Government work product. If Mr. Rosen wants the raw files, I will have to dig through each one of the bank files and give it to him.

[400] CROSS EXAMINATION
BY MR. ROSEN: (Continued.)

THE COURT: Mark it for identification. It seems to me to be essentially work product information otherwise available to the defendant. Return it to the Government.

MR. ROSEN: Thank you, your Honor.

THE CLERK: Government Exhibit 18 marked for identification.

(So marked.)

Q. Did there come a time, Inspector, that you took the box Mrs. Helton gave you, that metal box, and submitted it for fingerprint analysis? A. The box was submitted for fingerprint analysis. However, I didn't bring it down.

Q. Did you also submit the $144,000 Mrs. Helton gave you for fingerprint and palmprint analysis? A. Yes, I did.

Q. How about the cardboard box Mrs. Helton gave you, is that also submitted for fingerprint and palm print analysis? A. I believe the cardboard box was also submitted.

Q. Were requests made to the laboratory to compare prints with those of David Walker? A. The request was made to compare the prints of [401] David Walker, Helen Helton —

Q. Would you please answer my question, Inspector? A. I'm trying to answer your question.

MR. ROSEN: Let me withdraw it and ask it again.

Q. Was any request made by you to the laboratory to compare the prints found on any of those three items with the palm prints and fingerprints of David Walker, yes or no, please? A. I can't answer that with a yes or no.

Q. Inspector, how long have you been with the Post Office? A. Approximately 6 years.

Q. How long have you been an Inspector? A. Approximately 6 years.

Q. Can you tell this jury whether you made a request that David Walker's palm prints and fingerprints be compared to those which were found on the metal box, the carboard [sic] box or the money; did you make any such request? A. Limiting it to David Walker?

Q. Including David Walker. A. Including David Walker?

Q. Yes, sir. A. Yes.

Q. Tell His Honor and the jury whether any of the [402] prints found on any of those items compared to those of David Walker, yes or no? A. They did not.

Q. They did not compare? A. They did not compare.

Q. Did you or any of the agents working under you seize Mr. Walker's white Jaguar? A. Yes.

Q. And conduct a search of the Jaguar? A. Yes.

Q. Did you find any of the money allegedly missing in that Jaguar? A. No.

Q. Do you still have the Jaguar under your control? A. Yes.

Q. Did you take sets of keys from David Walker when you arrested him? A. Yes.

Q. Were any of those keys the keys of a safety deposit box? A. I don't recall without looking at the inventory. I believe one was a safety deposit box key.

Q. Did you find the safe deposit box which that key represented? [403] A. No, I did not.

Q. Did you look? A. Yes, I did.

Q. Do you have the key here? A. I believe I do, yes.

MR. ROSEN: Might I have those keys that were seized from Mr. Walker at the time of his arrest?

MR. SCOTTI: The agent would have to come down.

MR. ROSEN: I'll pass on that now.

Q. In all of the searching through boxes, through the house, the car, did you ever locate any money which you claim was stolen from Kennedy Airport, building 179, on September 22, 1975? A. No.

Q. I believe you told His Honor and the jury at the very beginning of your testimony that you were in charge of investigating crimes in the Post Office? A. At Kennedy Airport.

Q. At Kennedy Airport.

Maybe we can save time by asking you these questions, Inspector. Do you know of your own knowledge as, I guess, a criminal investigator at the Airport, how many security personnel were on duty at or around building 179 on September 22, 1975, let's say between the hours of 5:00 and [404] 7:00 in the morning? A. On actual post or including the control room?

Q. Including everybody that was a security guard who reported for work that day. A. I can look at the documents and tell you.

Q. I would appreciate that. A. I have —

Q. You have no idea, is that what your testimony is, that you have no idea — A. My testimony is I'll look at the documents and tell you exactly how many.

MR. ROSEN: With the Court's permission —

THE COURT: Are they here?

THE WITNESS: Yes.

MR. ROSEN: That will save a whole witness, your Honor.

THE WITNESS: Yes.

(Witness leaves stand.)

(Witness resumes stand.)

Q. Do you need some time to look at it? A. Just a few seconds.

Q. Yes, sir? A. There were 18 security officers on duty at JFK including all of the buildings.

Q. There are four buildings? [405] A. Well, three buildings.

Q. Let's reconstruct it, if we might, Inspector, to this chart which is Government Exhibit 5. Will you tell His Honor and the jury how many of those 18 were working in or about the registry section, this flight deck, or any other place represented by this chart on September 22, 1975 at approximately 5:00 in the morning to 7:00 in the morning? A. I'll show on this chart, but I also have to use the other chart.

MR. ROSEN: Would your Honor mind if the witness came down, without seeking to destroy the chart further, perhaps put a mark where the security personnel are?

THE COURT: Take a red pencil or other color.

(Witness leaves stand.)

THE COURT: What are you using?

THE WITNESS: A red felttip pen.

A. This is one security force post located

here at the exit from the registry room. On September 22, 1975, there was also a security police officer assigned to this exit (Indicating.).

THE COURT: The witness is marking the chart with X's.

A. There is a security police office assigned to the airline platform. There is a security police officer [406] that has an assigned post outside this portion indicated as the receiving unit (Indicating). That's all I can show on this chart.

Q. On that chart. So there would be four on that chart? A. That's correct.

Q. Inspector, I don't want to get picky with you, but you kept marking X's by exits. See these two exits here? Actually you mean there's a security officer right by the exit, not the way down here? A. What I mean, he's not required to — his area may include this area. He's free to walk around in the area if he wishes.

Q. With the Court's permission, would you show us on Exhibit 15 in evidence where other security personnel would be positioned or would be assigned on September 22, 1975 at approximately 5:00 to 7:00 in the morning? A. There's a fixed security booth located at the exit at the airmail facility. There's another fixed security booth located at the entrance to the AMF; another fixed security booth located at the employee's entrance from the parking lot into the

AMF. In addition to the fixed positions, there are two other positions referred to as roving positions. These roving positions would include a post in this area, [407] (Indicating.)

Q. Sir, could you do that a little darker so it would remain there, with the Court's permission? A. A roving position for a security officer in this area (Indicating). The officer who is assigned in that particular area is responsible for relief of the other security police officers on their break, on their lunch hour; if they have to take a personal, he would relieve that particular post. At any particular time there's no way of telling whether or not a man is at a location or whether he's somewhere else.

Q. I didn't ask you that, but would you please — A. You asked me to explain the posts.

Q. Tell us who else is on duty. That's one roving man. How about another rover? A. There's another roving man in the employee's parking lot. This is not a fixed post. This is utilized when we have to send a jeep for gas or send it through the lot on the way out. If a man is coming back from escorting a flight, we'll bring him through the parking lot before he comes into the building.

Q. Just to summarize quickly, there are four inside and we see here one, two, three, — two rovers, that's five, okay, on duty at the facility, right? A. No response.

[408] Q. That's 5 outside? A. Three outside permanently and two outside occasionally.

Q. That would be 5, 3 and 2, right? A. That's correct.

Q. The 4 inside would be 9? A. That's correct.

Q. Are these trained security personnel? A. Yes, they are.

Q. Are there any laymen like myself or members of the jury allowed to rove around this facility?

(Witness resumes the stand.)

A. No, they are not.

Q. The security force is there to secure the postal employees? A. Security force is there to protect the plant facility and make sure outsiders don't gain entrance.

Q. Or things that shouldn't go out don't go out? A. That's correct.

Q. One last area, sir. Again, based on your responsibility as the criminal investigator at this security, — I don't know if we can all see this, but let me try. This area here is called "Supervisor's Parking," am I right? A. Yes.

[409] Q. No question Mr. Walker was a supervisor on September 22, 1975, am I right? A. That's correct.

Q. You here here [sic], were you not when Mr. Marchione drew this picture of a truck on this diagram? A. Yes, I was.

Q. Trucks are parked adjacent to this supervisor's parking, am I right? A. Yes.

Q. That's all still within the fenced-in area? A. Yes, it is.

Q. The supervisors park within the fence and so do the trucks park within the fence? A. Yes.

Q. Are you aware, Inspector, that — withdrawn.

Mr. Marchione indicated the trucks park up against the fence, am I right, they back in up against the fence? A. Yes.

Q. With the front of the truck pointed away from the fence and the back of the truck up against the fence, am I right? A. They're in the direction of the fence. I don't know whether he said up against the fence or not. The back [410] is towards the fence, yes.

Q. The back of the truck is up against this fence, am I right? (Indicating.) A. The back is towards the fence, yes.

Q. Trucks, the tractor-trailers are forty foot trucks? A. Tractor-trailers come in various lengths.

Q. The big ones are forty foot? A. I believe they're forty feet.

Q. If we had all forty foot trucks they would all be lined up in a row against that fence with the fronts pointing away from the fence, okay, you accept that? A. If you had all forty footers I would accept that.

Q. The truck in question that Mr. Marchione told us about yesterday, that was a smaller truck, was it not? A. I don't remember whether he said it was a smaller truck. He said it was a silver truck.

Q. We'll have to ask him, I guess.

Hypothetically, if it was a smaller trailer, tractor-trailer — let's say a twenty foot tractor-trailer, okay, you're with me? A. I'm with you.

Q. And that was parked in that same area, based on [411] your experience, would the fronts be all lined up together even though the trailer is 20 foot shorter than the big ones? A. No response.

Q. The fronts would all be in the same line, would they not?

MR. SCOTTI: I'm going to object to this

line of hypothetical questions. I don't see the relevance. It would depend upon how the trucks are parked. I don't know if the witness can answer that.

MR. ROSEN: Might I expand?

THE COURT: It's not helpful. You can argue to the jury.

MR. ROSEN: I want to know, based upon his experience and physical observations, whether he's seen the frnts [sic] of those trucks always lined up together when it's required to line up the front of the trucks.

THE COURT: Very well.

Q. Do you know based on your physical experience, visually at the Airport, whether those trucks are always lined up with the fronts all together in a row ehen [sic] they are parked there? A. I can only tell you from what I've seen.

Q. Okay. A. And my experience has been as they park them, [412] some trucks, the backs of some trucks are closer to the fence than others. What the requirements are for parking trucks, I don't know.

Q. You don't know, okay.

MR. ROSEN: I have no further questions. I'm sorry, Judge, I do have one more question.

CROSS-EXAMINATION
BY MR. ROSEN: (Continued.)

Q. I was handed this document.

MR. ROSEN: I'll have to mark it.

THE CLERK: Defendant's Exhibit W marked for identification.

(So marked.)

Q. Mr. Mullins, have you seen this document before? (Handing.) That was just handed to me, Defendant's Exhibit W for identification? A. Yes.

Q. Is that a surveillance report of David Walker? A. Yes, it is.

Q. Did you make this or supervize [sic] it being prepared? A. Did I make a photocopy or did I make the original?

Q. Did you have anything to do with the preparation of that? A. No response.

[413] Q. Was it under your command? A. No response.

Q. Are we having trouble? A. I think we're having trouble.

MR. ROSEN: Let me withdraw that.

Q. Were you the agent in charge of this investigation in February of 1976? A. During what portion of February?

Q. February 18th. A. It was right around that time that — I told you the other day I was in the hospital for two weeks. It was in February. I don't remember the particular time.

MR. ROSEN: Let me withdraw it.

Q. Were surveillances of Mr. Walker done under your supervision, your direction, your authority or anyone of these things? A. Yes, they were.

Q. Certainly with your knowledge? A. Yes, with my knowledge.

Q. Was a conversation overheard by one of your operatives or one of your agents of David Walker on February 18th, 1976? A. I don't know. I haven't read the notes that I gave you this morning.

[414] Q. Take a look at this, please (Handing.). See if there's a conversation overheard of David Walker on that day? A. Would you give me the date?

Q. It's right there, February 18, 1976.

MR. ROSEN: Might I approach and perhaps direct the witness's attention?

(Mr. Rosen approaches the witness.)

Q. You see that? A. Yes.

Q. Was there a conversation overheard by one of your operatives that when you hit big on a number somebody goes out and buys a bottle of champagne?

MR. SCOTTI: I'm going to object.

THE COURT: Did you overhear the conversation?

THE WITNESS: I didn't overhear any conversation.

THE COURT: Next question. Go to something else.

MR. ROSEN: I have no further questions.

[415] REDIRECT EXAMINATION BY MR. SCOTTI:

Q. Inspector Mullins, Mr. Rosen asked you if you had sent down for comparison the boxes and things you got, the money, from Helen Helton with the fingerprints of David Walker. You said you had and that the result of that laboratory analysis were negative, there were no fingerprints or palm prints of David Walker's on any of those articles; is that correct? A. Yes, it is.

Q. You said the report you sent down included David Walker. Were there other names, other fingerprints that were submitted with the same report? A. Yes, there were.

Q. Whose fingerprints did you also send down for analysis to see if their fingerprints appeared on the money or the box or the metal box or whatever? A. I sent down fingerprints from bank tellers in Milan that had handled the money. I sent down fingerprints —

MR. ROSEN: I will object to that, whether he knows who handled the money.

THE COURT: I'll permit it. Go ahead.

A. I sent down fingerprints, I believe, of Anthony Shortt, Helen Helton, I believe, Rosario Marchione. I'm not [416] certain whether that is all the prints I sent down, but I either sent with the report or requested that they obtain these fingerprints and compare them.

Q. What was the result of the comparison? A. They were not able to identify any of the fingerprints developed on any of the bills with any of the fingerprints that they were comparing them with.

Q. What about the box? A. Or the box or the metal box.

Q. In other words, they weren't able to

identify anybodys fingerprints, Mr. Walker's or anybody elses? A. That's correct.

Q. You testified with respect to the security personnel with regard to Government's Exhibit 5, in evidence, which is the chart of the first floor of building 179; that there were two security guards who had posts around the exits to the registry section; is that correct? A. Yes.

Q. You also testified that there was a security guard on the airline platform and one outside by the receiving unit, is that right? A. Yes.

Q. The guards on the airline platform and the receiving unit, are they inside the unit or outside the building? [417] A. The airline platform and receiving unit guards are outside the building.

Q. Outside the building of 179? A. Yes.

Q. So that instead of four guards being inside, there are only two? A. Only two in the building, yes.

Q. By the way, these guards on this side of the building (indicating) — withdrawn.

Were these guards inside on this side of the building by the airline platform, the receiving unit have any way of looking through to the flight deck area where it's indicated that the skid was wheeled out?

MR. ROSEN: I object to the form of the question.

THE COURT: Overruled.

A. No, there is no way of looking through two sets of walls.

Q. What about this guard over here by the con-con desk entrance?

THE WITNESS: May I answer?

THE COURT: Yes.

A. You can't see on to the flight deck from inside the building at that location.

Q. Would this guard be able to see this area [418] (indicating) — withdrawn.

Would he have a good view as this guard over here (indicating)?

A. It would depend upon the mail or equipment in the area. He might not be able to see it at all.

Q. You testified that the defendant, Walker, was under surveillance while he was inside the building 179; is that correct? A. Yes.

Q. During the time that he was observed on the surveillance, was he observed pushing or pulling any skids or tubs? A. Yes, he was.

MR. ROSEN: Could we find out when, if your Honor please?

THE COURT: Yes, let's try to pin it down.

Q. Can you tell us when, Inspector Mullins? A. I don't remember the exact date, but I do remember that within the first two weeks of the time the surveillance was initiated, in September of 1975, on several occasions I observed him myself to be handling equipment, pushing mail.

Q. Inspector Mullins, we have heard much about what Mr. Rosen calls a bugging device, which I call a tracking device affixed to Mr. Walker's car. Would you please tell the [419] ladies and gentlemen of the jury what that is? A. The device we utilized as a wagon hut bloodhound. It's a system whereby we put a transmitter on a vehicle which emits a signal and we place a receiving unit in one of our cars which receives that signal and from a determination of a meter on the box in the car we are able to determine the direction that a car takes. With some accuracy we can tell how close we are to an individual, but only in relative terms. We can tell the direction of the signal.

Q. During the course of your investigation in this case, Inspector Mullins, did you determine where the 12 stolen parcels had been sent from? A. Yes, I did.

Q. Please tell us where they were sent from? A. Ten of the parcels were sent from Milan, Italy.

Q. From where in Milan?

MR. ROSEN: I'm going to object to this, your Honor.

THE COURT: Sustained.

MR. ROSEN: Thank you. I move to strike the answer.

THE COURT: Make your objection promptly.

BY MR. SCOTTI (Cont'd):

Q. Did you determine where these parcels were to [420] go?

MR. ROSEN: I object, if your Honor please.

THE COURT: Sustained.

Q. Did you determine whether or not these parcels were ever delivered in the ordinary course of the mails?

MR. ROSEN: Objection to that.

THE COURT: Sustained.

MR. SCOTTI: I have no further questions.

RECROSS EXAMINATION
BY MR. ROSEN:

Q. You say you saw Mr. Walker pushing mail around the facility on several occasion [sic]? A. I saw him handle mail, yes.

Q. What do you mean handling mail, pushing skids, tubs? A. Either pushing a skid or tub. I don't recall at this particular time.

Q. Where were you when you saw him, up in the tower there looking through a peephole? A. In the lookout gallery, building 179.

Q. There is like a balcony where you guys go through to watch the people downstairs, right? A. Yes.

Q. When you saw David Walker pushing all this mail, [421] did you go down and arrest him? A. No.

Q. Nothing wrong with him pushing mail, is it? A. No. It's unusual for a supervisor —

THE COURT: Excuse me.

MR. ROSEN: Move to strike.

THE COURT: Yes, you weren't asked anything further. Strike that.

MR. SCOTTI: Thank you, Mr. Mullins.

THE COURT: Next witness, please."

* * *

[Commencing at page 630]

"(The following took place in the absence of the jury.)

THE COURT: Yes?

MR. ROSEN: May it please the Court —

MR. SCOTTI: Your Honor —

MR. ROSEN: I have an application to make.

MR. SCOTTI: No, let me —

THE COURT: Excuse me. I will hear you.

MR. SCOTTI: Well, I was going to make a statement for the record before Mr. Rosen talks to the Court. I was waiting for the Court — your Honor to be through with the calendar.

THE COURT: He has an application. I will be happy to hear the application before me.

MR. ROSEN: Your Honor, at approximately 10 o'clock this morning I called — Mr. Scotti handed me 3500 material of Agent

Mullins given to the Grand Jury on August 17, 1976, which material I have read through twice. And I can tell your Honor there is substantial material in here that I would have used on cross-examination.

THE COURT: Mark it for identification.

What is your application?

MR. ROSEN: I have to move at this time, most respectfully, for a dismissal of the indictment.

[631] THE COURT: I am not going to dismiss the indictment.

MR. ROSEN: And/or in the alternative for a mistrial.

THE COURT: You are moving for a mistrial?

MR. ROSEN: Yes.

THE COURT: Let me look at this material.

MR. SCOTTI: Can I make a statement?

THE COURT: Certainly.

THE CLERK: Jury note marked as Court Exhibit 12.

MR. SCOTTI: There's no question, your

Honor, that I forgot to give Mr. Rosen the Grand Jury minutes of Mr. Mullins. Your Honor will recall that at the time that Mr. Mullins was called — I am not saying this by way an [sic] an excuse. I'm saying it by way of fact. The Government was putting witnesses on very quickly. Your Honor called me to the Bench, to the sidebar with Mr. Rosen to ask — for the purpose of Mr. Mullins' testimony. I explained to your Honor the questions that I wanted to ask Mr. Mullins and why I wanted to ask them. And counsel acting — possibly as a defense strategy, and your Honor allowed me to use Mr. Mullins for a limited purpose. I think your Honor told me to limit myself to the questions you allowed.

[632] At that point Mr. Mullins was put on the stand. And I — Mr. Rosen, although he asked me for material as to other witnesses throughout the trial, and I, indeed, had given him material as to other witnesses without his asking. He did not ask me if there was any 3500 material on Mr. Mullins. And I simply forgot to give it to him.

Mr. Mullins testified to the very limited area on direct. And then Mr. Rosen took Mr. Mullins basically as his witness — I think the record reflects that — and examined him on things which went far beyond anything the Government did in its direct examination.

In reviewing the Grand Jury minutes, I must — before I get into that, I must state to your Honor that the first time I realized I hadn't given

the Grand Jury minutes of Inspector Mullins was last night. And when I came in this morning, I got the minutes and gave them to Mr. Rosen.

In reviewing the Grand Jury minutes, I don't find anything in there — contrary to what Mr. Rosen says — which would in any way have affected the outcome of the presentation of the evidence or could in any way possibly, let alone beyond a reasonable doubt, affect any verdict the jury may render in this [633] case. In fact, Mr. Rosen has told me in the hallway that there is one particular portion of the transcript testimony, the Grand Jury transcript testimony that he is very concerned about. I tried to explain to Mr. Rosen what that Grand Jury testimony relates to. And, in fact, if that had been gone into by Mr. Rosen, it would have been detrimental to the defense and very helpful to the Government.

Of course, the Government did not go into that area with Inspector Mullins on its direct examination. As your Honor recalls, the Government was instructed to limit its questions very severely with regard to Inspector Mullins.

I don't think that there is anything that can be reasonably interpreted in the Grand Jury minutes to warrant any of the relief sought by Mr. Rosen at this time.

MR. ROSEN: May I be heard?

THE COURT: Well, let me say at the outset, if this were an isolated instance it would

not be objectionable. But, Mr. Scotti, you have consistently during this trial attempted to hold up, in my opinion, these 3500 materials until the last moment.

MR. SCOTTI: Your Honor —

[634] THE COURT: That's for tactical advantage, at least in my opinion, rather than giving them to the defendant in advance and in a simple way so you got it out of your desk and on to his, thus avoiding this kind of mistake that has occurrred on a variety of occasions in this Court during the hurly-burly life of the trial.

Now, this kind of tactic, although it is, as you have properly pointed out to me, permissible to the Government, seems to me constantly leads to this kind of mistake. I have had it in my cases a half dozen times. As a matter of fact, in one case I had a reversal for this silly thing. Because when counsel gets involved in the trial, there are a thousand things on his mind and he can't remember to do these things.

I thought we had worked it out with Mr. Trager so that this wouldn't be happening. If you had turned it over in advance and you had a check list — you knew the witnesses you are going to call. You turn over the material. Counsel for the defendant looks at them. We don't have to have a continuance and the trial runs more smoothly. This is the result of this kind of sharp — what I consider sharp practice by the Government, although the [635]

Government is properly and justifiably doing it under the statute.

MR. SCOTTI: Your Honor, may I respond to that.

THE COURT: Of course.

MR. SCOTTI: With all due respect — I hope you appreciate, with all due respect —

THE COURT: Yes.

MR. SCOTTI: I take strong exception to your Honor's characterization of me and of the Government's tactics as being a — with regard to this 3500 material as being a tactic which is calculated to gain some advantage. I think the record will adequately reflect that throughout the course of the pre-trial discovery in this case, I have given everything to defense counsel. With Mrs. Helton's testimony, I gave him the 3500 material in the beginning of the day.

Now, Mr. Rosen said at lunch time that he — after the luncheon recess that he hadn't read through it all. I gave it to him at the beginning of the day.

With Mr. Marchione, he had it overnight. I gave it to him in the beginning.

THE COURT: Why didn't you give it to him at the beginning of the trial.

[636] MR. SCOTTI: Your Honor —

THE COURT: A lot of time wasted. At the beginning of the trial when we are getting jurors together, while we are handling other things. You've got a capable opponent on the other side. It is not as though he were a member of the Mafia that he couldn't trust.

MR. SCOTTI: I respectfully submit — I most respectfully submit that is beside the point. The only —

THE COURT: Well, it's exactly the point. That's why this happens all the time.

MR. SCOTTI: Your Honor, the only time that the 3500 material testimony was given to Mr. Rosen at the time the witnesses were testifying before the Government put the witness on the stand were isolated instances. I think there were two or three instances where the 3500 material consisted of one or two or three — maybe three pages. And it certainly wasn't any burden to read through that 3500 material at that time.

THE COURT: You don't listen to what I am saying. I am telling you that if you know the witnesses, as you did in this case, who are going to testify and you make a list of them and you turn [637] over the material quietly and calmly before the trial begins so you don't have this on your mind, we don't have this kind of nonsense.

MR. SCOTTI: Your Honor —

THE COURT: But the Government — at least some attorneys — doesn't seem to be a consistent practice in your office. Some attorneys do that. And those cases go off like silk.

MR. SCOTTI: Well —

THE COURT: In this case I wasted at least two hours of trial time because the defendant was able to make the claim — whether justified or not is not my concern — and he needed time to read the papers.

MR. SCOTTI: And that time was with regard to Mrs. Helton. He was given the material before she took the stand.

THE COURT: Well now, we have the situation and you still apparently haven't learned anything.

MR. SCOTTI: I still want to put on the record, this was not a tactic by the Government to gain any advantage. Certainly there would be no advantage to be gained at all.

THE COURT: Yes, there is a tactic to be gained. And the tactic is that you throw your [638] opponent off balance. He uses the same tactic and you use it. I saw it in Court. And I understand it's constant and I — a standard tactic to get your opponent slightly off balance. It's done all the time.

MR. SCOTTI: I don't understand that because he certainly could ask for an adjournment, which he did, for the time to read the testimony right in front of the jury. If anything, it seems to me to be a disadvantage of the Government —

THE COURT: Both of you are skilled at using these witnesses, including Mr. Rosen with his smile and ingratiating manner, which is all part of the tactic. I don't criticize him. And you have the same tactic. I don't mind it as long as it doesn't interfere with my getting cases tried and out. This kind of tactic, I don't like simply because it slows me up. I am not concerned about anything else but getting these cases decided quickly and properly.

Now, I say in this case I lost two hours of trial time and now I have this silly motion before me while I have a jury that has been out for a day and a half.

I don't say "silly" in the sense that it's not a substantial motion. But it's silly in the sense [639] that I shouldn't have to have it.

Go through this record and show me exactly what you would have used and why it is prejudicial.

MR. ROSEN: Yes, sir. I would have used at page —

THE CLERK: Marked as Defendant's Exhibit AA for identification.

MR. ROSEN: Starting at page 9, your Honor, if your Honor please, where Mr. Mullins told the Grand Jury that the surveillance of Mr. Walker continued until December, 1975, when the foreign dispatch unit moved into another building, Christmastime, because they get a heavy concentration of mail, and he says here that David Walker went with that dispatch unit to the other building. The surveillance had to be discontinued because of the new building. There is no surveillance potential. That is absoluetly not true.

Mr. Walker did not go with the unit. He was specifically kept on in Building 179 to be kept under surveillance. Mr. Walker did not get transferred. And I would certainly be able to develop that.

THE COURT: No. That is just on the credibility of the witness Mullins. It's go no [640] substantial significance of any kind with respect to guilt or innocence.

MR. ROSEN: On page 9, I would then be able to show that Mr. Mullins testified that these parcels were not registered parcels at all, did not — they would not have gone into that — registry insured parcels do not — are not handled the same way. They do not come through that section.

I am not familiar with the exact terminology, but when they are insured, this Miska or Con-Con, they are not regular registered mail, although he had said so in the Grand Jury that they were. I would have been able to prove that they were not — in any event, they were not registered mail.

THE COURT: What difference does it make/

MR. ROSEN: That these parcels were not in that registry room. That is a very critical point. Insured parcels rather than registered — they were not registered.

THE COURT: Why didn't you —

MR. SCOTTI: In the Grand Jury minutes it really says at page 10 that these were insured parcels coming into the United States, and the procedure at Kennedy Airport is that they go into the registered section.

[641] MR. ROSEN: I would dispute the —

INSPECTOR MULLINS: May I state —

THE COURT: Cross-examine him now on it. Let's see what it is.

INSPECTOR MULLINS: Your Honor, all insured —

THE COURT: Excuse me. I don't want to —

Cross-examine him on that point right now and let me hear what you would have developed.

MR. ROSEN: Okay.

EXAMINATION OF THE WITNESS,
EDMUND MULLINS,
BY MR. ROSEN:

Q. Inspector Mullins, is it a fact that you testified before the Grand Jury that these were insured parcels rather than registered parcels? A. I testified that the ten of them were insured parcels, yes.

Q. The ten which you claimed had $80,000 in each of them? A. That's correct.

Q. And isn't it a fact that insured parcels are handled differently than a regular registered parcel, if you know? Do you know if insured parcels are handled in any way differently than a registered — A. They are handled differently, yes.

Q. All right. Would you tell us in what way [642] they are handled differently? A. I will be glad to. All insured parcels are initially brought into the registry section at Kennedy Airport, with the exception of India, Italy, Germany, the Netherlands and Switzerland. All parcels from — all parcels from India, Italy, Germany,

Netherlands and Switzerland, since November 1974, by logistics order have remained within the registry section at Kennedy Airport. Insured parcels from all other countries are gone through. Those valued at under $250 are sent to Annex Number 3, and those valued at over $250 are kept within the registered section.

Q. Thereafter, what is the movement of the insured parcel over $250? A. With regard to which countries?

Q. Looks like Italy. A. Italy, they are handled as registered mail. Dispatched out as registered mail by the logistics order and by reaffirmation of postal bulletin.

MR. SCOTTI: Mr. Rosen was given that information in discovery.

MR. ROSEN: What information.

THE WITNESS: He has the operations order.

MR. SCOTTI: I gave it to him in December.

MR. ROSEN: May I, Your Honor."

* * *

[Commencing at page 655]

"(Whereupon, the jury retired from the courtroom.)

MR. SCOTTI: For the record, I would have objected to that charge, but it's too late now.

(Recess taken.)

THE COURT: All right, take the stand, Mr. Mullins.

EDMUND MULLINS, having been previously duly sworn, testified further as follows:

EXAMINATION BY MR. ROSEN:

Q. Mr. Mullins, are you personally familiar with how insured packages were handled that came in from Italy to building 179 on September 22, 1975? A. Yes, I am.

Q. All right. Now, isn't it a fact that there is a person by the name of Mrs. Samuels, who was the insured receiving clerk that day or that morning at JFK Building 179? A. I think so. You have the documents right now. I don't know. If her initials are on the bottom.

Q. Sir — No, I don't have any document. You heard of Mrs. Samuels, the insured receiving clerk? A. She opens the insured bags, yes.

Q. Right. When she opened the bags and they are determined to be of her of high value, she herself makes up the parcels; isn't that true?

[656] A. No.

Q. Doesn't she — doesn't the insured receiving clerk have the parcels stamped by a Customs man, insured, valuable parcels, stamped by a Customs man, sir? A. Anything that is valuable that goes into the vault are stamped by a Customs man in the vault. We don't give them to the Customs people.

Q. Any of these parcels here, any of the packages here indicate that they were stamped by a Customs man? A. I don't have the parcels. I don't know whether they were stamped or not.

Q. Well, on your records — A. They don't. The records would not reflect it. The only thing that would reflect whether or not they were stamped is by the parcels.

Q. That's a distinction between regular and insured mail? A. No.

Q. All registered mail is stamped by Customs people? A. Registerd mail. Parcel type mail is examined by Customs people and either stamped liable for duty or stamped pass free.

Q. Is it your testimony that Helen Helton would have made up parcels of insured valuable,

non-registered on [657] that morning? A. I believe I stated to your Honor before that all insured parcels from Italy are handled as registered mail at Kennedy Airport and from Kennedy Airport throughout the domestic registry system

Q. Would it include parcels of high value? A. Any insured parcel.

Q. No. Couldn't it be a $250 parcel? A. All insured parcels from Italy are handled as registered mail.

Q. And you are telling me that Helen Helton would have made up a canvas sack of insured parcels just like she did the registered parcels? Yes, or no, please? A. Helen Helton would have made up insured parcels in a registered mail bag, because at that point they are considered to be domestic registered mail.

MR. ROSEN: Just a monent, if your Honor please.

Q. Let me ask you this, again, Inspector:

Isn't it a fact that the person in Kennedy Airport, building 179, who handles insured parcels of high value — okay — makes up his own mail sack as opposed to somebody in the registry room like Helen Helton? A. It can be done if it's recognized as high value. Sometimes they do not make these dispatches.

[658] Q. Isn't it a fact that parcels coming in insured directed to a bank would be deemed just such a kind of high value parcels? A. No, it is not.

Q. No? A. No.

MR. ROSEN: I have to go on to something else, your Honor.

I don't really know basically the procedure, but I would represent to your Honor — I must respectfully represent to the Court that I have information that is not in accordance with that. But that is not my problem.

THE WITNESS: Your Honor, I —

THE COURT: I do not want to hear — With all due respect, I want you to indicate to me how your examination would have been different if you had this information. So go ahead and examine.

MR. ROSEN: Okay, your Honor.

Q. Now, isn't it a fact, Mr. Mullins, that you testified before the grand jury that ten of the parcels, ten of the twelve we are talking about, the ones that came in from Italy, came in to Kennedy Airport and were entered in that value cage at 4:30 in the morning of September 22, 1975? Did [659] you say that before the grand jury? A. If it's in the record, I said it.

MR. ROSEN: I most respectfully represent that it is in there.

THE COURT: All right.

MR. ROSEN: I don't think I have to examine much more on that. It would have been a critical thing for me to examine Mr. Marchionni and the agents if the parcels came in at 4:30, Judge, when Mr. Walker is already out to lunch. It just couldn't have happened the way the testimony says it happened. They didn't even get into that value room until 4:30. Nobody knew it was there until 4:30. And I think it's a very critical — most respectfully, based on the testimony we have here, a critical thing, and I could have developed through the inspector that they didn't even get there, because I asked Mrs. Helton and she didn't know when they got there. There's nothing on the documents.

I understand your Honor may be impatient with me, but I would like to do it.

THE COURT: I am not impatient.

MR. ROSEN: You're shaking your head, "no." Maybe you disagree with me. There's nothing on either [660] exhibit 6, Judge, or that vault log. And I asked Mrs. Helton very specifically, could you tell me the exact time as these things —

MR. SCOTTI: Your Honor,—

THE COURT: But that has nothing to do with this. It's quite clear through the entire testimony that there was a target of opportunity. It was just a chance. She went in and got some stuff. It doesn't make any difference whether it was there 24 hours or 24 seconds.

MR. ROSEN: No, no.

THE COURT: And nobody else knew where the specific parcels were coming from Italy. It's never been any part of the theory. This is really all irrelevant.

MR. ROSEN: But at — between four and five — Mr. Marchionni testified between four and five Mr. Walker came up to that swing room and already — starting at 4 o'clock in the morning, Judge.

THE COURT: 4:30.

MR. ROSEN: No, your Honor. Most respectfully, page 313 of the record, it says that at between 4 o'clock and 5 o'clock Dave Walker came up to that swing room and asked them, does he have —

[661] THE COURT: What time did Marchione go out to lunch?

MR. ROSEN: Walker went from 4 to 4:30. Marchioni from 4:30 to 5.

THE COURT: That's exactly it. When

Marchioni was out to lunch the packages had already arrived.

MR. ROSEN: The packages arrived at 4:30. Marchioni went out to lunch at 4:32, Judge. I think it would have been important for me to argue that what they are saying here, this whole thing was crystallized in a two-minute period between 4:30 and 4:32. And I think it would have been most critical.

THE COURT: Nothing to do with anything, with any point in the case.

MR. SCOTTI: Your Honor, as you have already articulated, I would point out that Government exhibit 6 in evidence, which Mr. Rosen just referred to, is — does not indicate any time. It does indicate that the parcel was made up. The bag that was stolen was made up by Mrs. Helton sometime after 5 o'clock. He had cross-examined Mrs. Helton on that. It does state a time.

MR. ROSEN: Judge, what I think is critical, most respectfully, is that I could have developed with [662] Mr. Mullins and argued to the jury that now we know exactly when this parcel came in, because there was testimony that it was left over from 2 or 3 the day before. We have that in the record. And it's absolutely not so.

Mr. Walker just couldn't — could not have — Mr. Walker could not have gone up there

between 4 and 5 and say there is a bag from Miami going to the West Indies. And the testimony is it was left over from 2 or 3 and came through that wind tunnel.

THE COURT: It's clear what happened, that the defendant Walker was telling Marchioni something that was untrue in order to mislead him, to come down with the hope that Mrs. Helton would get a package together.

MR. ROSEN: I am not going to belabor it. I submit that it would have been important for me to argue to the jury that the inspector's investigation determined that the parcel didn't get to Kennedy, into that room, until 4:30.

THE COURT: Yes, I understand.

MR. SCOTTI: May I be heard?

THE COURT: But it's really irrelevant to anything in the case.

MR. ROSEN: I respectfully —

[663] MR. SCOTTI: For the record, Mr. Rosen is incorrect as to the total number of parcels. I agree that it's irrelevant, but for the record, exhibit 7 in evidence clearly shows that the two Granda parcels did come in at 2:03 on 9/21, which is September 21st, which would have been the 203.

THE COURT: It doesn't make any difference whether it was there a week.

MR. SCOTTI: I agree with your Honor, but just for the record, the record does show it did come in on 203.

MR. ROSEN: Shall I go on as if I had this material?

THE COURT: Yes, please.

Q. Now, Mr. Mullins, did you answer — this is page 12, before the grand jury:

'In connection with this investigation, did you determine who else was on duty the night or early morning of September 22, 1975?

'Answer: The foreman of the registry room on that date was David Walker. I found all twelve parcels listed on a bill for the Church Street Station.'

MR. ROSEN: May I have that?

'The next step in procedure in the registry room [664] would have been for the bag itself, which is identified by a rotary lock number, to be listed on another bill going to GPO, New York. We have searched all of the records and there is no record of that rotary lock ever being listed on the bill going anywhere from Kennedy Airport.'

THE COURT: That's exactly confirmatory of Mrs. Helton's testimony.

MR. ROSEN: Government exhibit 6, your honor, has a rotary lock number on the record which he says did not exist.

THE COURT: Well —

MR. SCOTTI: No, your Honor, that is not the record. The witness will be able to explain rather than Mr. Rosen making statements.

MR. ROSEN: I am sorry, Judge.

Q. Did you — I show you Government's exhibit 6. Is this an exhibit containing the parcel numbers of the ten parcels that come in from Milan and the two from Granda that we are talking about in this whole case? A. Yes.

Q. Do you see in the top right hand corner, lock number 445? Do you see that? Or 58, or whatever the number is? [665] A. Yes, there is a lock number.

Q. Is there a rotary number on there, 402? A. Yes, there is.

MR ROSEN: Your Honor, I would have most respectfully —

THE COURT: What is the explanation?

THE WITNESS: Well, your Honor, I —

Q. What is your explanation? A. I said it in the grand jury. There's no record of this lock

number that is on this bill being listed anywhere from Kennedy Airport. I mean the lock number up here goes on another bill to be listed out. And we have checked the records and it is not listed out.

Q. Well — A. This is a content bill, your Honor.

THE COURT: A what?

THE WITNESS: This is a content bill. This tells you what is inside the rotary lock. Now, to find out if this rotary lock goes anywhere, we look at another set of bills like this one. Instead of having registered numbers, we have rotary numbers.

THE COURT: When the bags go out of Kennedy with rotary locks on, they show the rotary lock —

THE WITNESS: The rotary lock is listed like the [666] registered numbers are listed. And as I said in the grand jury, it is not listed out.

THE COURT: That is confirmatory.

MR. ROSEN: I would object to what he said. There is no record of that rotary lock ever being listed going anywhere from Kennedy Airport. I don't know what bill —

THE COURT: He just explained —

MR. ROSEN: Where is the bill? Where is the bill that showed anything about these packages after this?

THE COURT: There isn't any.

THE WITNESS: There isn't any.

MR. ROSEN: All right. Fine. Then I would have certainly suggested to the jury that there was a lock number put on at least this bill. I mean his not being able to find any records, I could have argued that there is a lock number on the bill, talking about these parcels, and that part of the procedure, the parcels coming out of Kennedy Airport —

THE COURT: But this is exactly confirmatory of the Government's case. I don't see how you would gain anything.

MR. ROSEN: Well, I — all right. I made my [667] position on the record.

THE COURT: All right, what else?

MR. ROSEN: The next is on page 13.

Q. Mr. Mullins, were you asked this question and did you give this answer with regard to David Walker:

'What kind of an investigation did you conduct?

'Answer: I conducted an investigation into his finances.'

Did you ascertain how much property he owned? A. Yes.

Q. Did you ascertain the fact that he had purchased certain stocks? A. Yes.

Q. Did you talk to somebody who — who he purchased the stocks from ? A. Yes.

Q. Do you say in your grand jury testimony when that purchase of 200 shares of Pan American for $11,000 was made? A Without looking at the transcript, I can't tell you.

MR. ROSEN: I will submit that he — the inspector does not give a date as to when this purchase of 200 shares of Pan American was made.

[668] THE COURT: You mean you would have listed this before the grand jury?

MR. ROSEN: Well, your Honor —

THE COURT: To show more assets?

MR. ROSEN: On the same basis that he could have contracted for this house prior to September 22, 1975. He could have purchased — it's for cash, 11800 shares of Pan American prior to September 22nd.

MR. SCOTTI: Your Honor —

MR. ROSEN: I would have developed that fully. Yes, I represent to your Honor that I would have.

MR. SCOTTI: Your Honor —

THE COURT: It seems to me not to have any particular significance, since your own client will tell you that. No.

MR. SCOTTI: For the record, this cash purchase was made well after — Well, a couple of months after the theft in question.

MR. ROSEN: That would be a big dispute, Judge.

MR. SCOTTI: We have the records. If Mr. Rosen wants to bring in the man who got the cash from Mr. Walker, he's free to talk to him. We have the stock account records, all the documents.

THE COURT: I can't believe you would have done [669] skillfully as you are, but go ahead.

Q. Mr. Mullins, were you asked the following question on page 15, and did you give the following answer:

In regard to the closing of the apartment house, you know what I am talking about?

'Answer: Yes.

'Question: Were the attorneys at the closing for the sale of these apartment buildings? Were they interviewed?

'Answer; yes, they were.

'Question: What, if any information was related to inspectors Caldwell, Goren, which was then related to you?

'Answer: At the time of closing, when it came time to produce a certified check or cash to close the deal, David Walker opened up his briefcase and dumped a pile of cash on the table which was described as the biggest amount of money that anybody had ever seen.'

MR. ROSEN: I most respectfully say or suggest that that differs with what Mr. Kershaw testified as to how the transaction occurred and whether David Walker dumped it on the desk or in the regular course of business opened up a briefcase and handed legal tender to purchase these houses. There is a [670] difference there.

THE COURT: That is all adverse to your client. Certainly when he testified in this court he knew I wouldn't permit him to put in such objectionable terms. We don't have the rules of evidence applying in the grand jury room. That's why.

Q. Did you continue to answer as follows:

'He' — meaning David Walker — 'took the cash to a bank and got a certified check for it. The people at the bank who counted the money were interviewed. They verified it was David Walker who brought the cash in and received a certified check.'

Did you tell the grand jury that Mr. Walker went with the attorneys and other people to the bank?

MR. ROSEN: And I represent, your Honor —

MR. SCOTTI: If he was asked, I don't see the relevancy of that at all.

THE COURT: Well, go ahead. Develop it.

Q. When you spoke to the lawyers or to the man who sold the building to Mr. Walker, did they tell you or did you ascertain that David Walker with others went to the bank, the Chase Manhattan Bank, to substitute the check for the cash?

MR. SCOTTI: Your Honor —

[671] A. I never spoke to anyone.

Q. You never spoke to anybody.

MR. SCOTTI: I believe the testimony—

THE COURT: Excuse me. Let him develop it.

Q. Did you say the attorneys at the — the attorneys at the closing for this sale of these apartment buildings, were they interviewed?

And you answered, 'They were — they were interviewed.'

MR. ROSEN: Upon those —

MR. SCOTTI: And the very next question —

THE COURT: Excuse me. Let him ask the question.

MR. ROSEN: But the witness states who interviewed him.

THE COURT: Let him develop his own —

MR. SCOTTI: I am sorry.

Q. 'What if any information was related to inspectors Caldwell and Goring which was then related to you?'

Do you remember being asked that question? A. Yes.

Q. Okay. Then you answered as I just read. Okay.

Was it related to you before you went into the grand jury that David Walker didn't go down to the bank alone, but went with other people, lawyers and actually people who [672] witnessed the transaction? A. Yes, I think it was.

Q. Right. Does that appear before the grand jury? A. You just read it. I didn't say it.

Q. Okay. That's all I am trying to develop.

MR. ROSEN: I would have used that to show some sort of attempt, most respectfully, to show the grand jury that this was some kind of stealthy transaction where he snuck down to the bank and tried to convert cash into the bank check.

MR. SCOTTI: Your Honor, that's irrelevant. Any attack he wanted to make in the grand jury proceeding, but not a trial —

THE COURT: I think it was irrelevant. It wouldn't have any bearing on credibility.

[673] Q. Now, did you also testify as follows, with regard to the purchase of these buildings:

'Did you yourself conduct the investigation or did other postal inspectors do it?'

MR. SCOTTI: Excuse me. Where are we?

MR. ROSEN: Let's go to page 15. Let's go over to page 15, to the bottom.

Q. 'Question: Now, was there any record that you discovered during the course of your investigation which would indicate the amount of cash which David Walker brought to the bank?

'Answer: Yes. There was an IRS form filled out by David Walker indicating the amount of cash, which was $100,020.49.'

Did you ever see that form? A. Yes.

MR. ROSEN: I would have certainly gone into that, Your Honor, and argued most strenuously.

THE COURT: Yes, you would have.

Where is that IRS Form? Why wasn't it turned over as Brady material?

MR. SCOTTI: Because, your Honor, he put the wrong social security number down. It is the wrong social security number. It is not the social security [674] number of the defendant.

THE COURT: All right. You would have opened the door to that and it would have been absolutely murderous.

MR. ROSEN: Let me see it.

THE COURT: Mark it for identification.

MR. ROSEN: All right, let's see. I just asked Mr. Walker what his social security number was.

THE COURT: If you continue at this rate the Government will join you in your application for a mistrial.

MR. ROSEN: I am doing the best. You will have to bear with me. I mean, you know —

THE COURT: All right. Continue while they iook for the document.

Q. Did you testify —

MR. ROSEN: This may be academic.

THE COURT: Go ahead.

MR. SCOTTI: I am sorry. I have it right here.

THE COURT: All right, mark it for identification.

MR. SCOTTI: Mark it as a Government exhibit.

THE CLERK: Government exhibit 19 marked for identification.

MR. ROSEN: I would only suggest that the [675] transript —

THE COURT: I will write at the bottom, these statements were not admitted into evidence.

MR. ROSEN: But portions of the statement are in the transcript.

MR. SCOTTI: Now, your Honor, I was specifically precluded from bringing this out on direct and specifically precluded from bringing it out on redirect.

THE COURT: That's correct. Because of the rule of hearsay.

MR. SCOTTI: No, not because of the rule of hearsay. It is my understanding, your Honor, of the rules, with all due respect, I thought your commentary said that if the witness has made a prior statement which was untrue the Government has a right to bring that out on direct examination and explain it and certainly after defense counsel cross-examined it. The Govenment has a right under rehabilitation to explain that to the jury. The Government was not allowed to do that.

THE COURT: Not in this case.

Prior consistent statement.

MR. SCOTTI: Not consistent. Not consistent. All I wanted to do is bring out the statements that were untrue. I didn't want to bring out prior [676] consistent statements. There had been no attack yet.

THE COURT: I will write out the pattern, these statements were excluded from evidence.

MR. ROSEN: Your Honor, I never offered them in evidence. The word 'excluded' may give the impression you didn't like them or something.

MR. SCOTTI: Now Mr. Rosen is trying to work this as a double —

MR. ROSEN: I am not trying to work it —

MR. SCOTTI: The Government is a party in this prosectuion also.

MR. ROSEN: I am trying to get your Honor to write to the jury that if they wish to hear any cross-examination regarding —

THE COURT: Were not admitted in evidence. You may — if you wish to hear the testimony of the witness Marchione — do you want to look at this?

MR. ROSEN: Yes

I except it without looking at it.

THE CLERK: Jury note marked Court exhibit 13.

MR. ROSEN: That's fine, your Honor. Regarding those statements, I would just — I think it's clear.

THE COURT: I think it's clear. Give it to the marshal, please.

[677] MR. SCOTTI: I have the document that Mr. Rosen was referring to marked as Government — it should be for identification.

THE COURT: Yes.

MR. SCOTTI: 19

THE COURT: May I see it, please?

MR. SCOTTI: If it's all right, I will put an I.D. on here.

THE COURT: Yes.

MR. SCOTTI: I also hand up to the Court 11 in evidence which is the payroll sheet of Mr. Walker with the social security number. You can see the last digit is not the same.

THE COURT: Which is the correct — 075 22 3507 listed in the Post Office or 075 22 3505 listed when he turned over $100,000 in bills.

MR. ROSEN: The correct one, as stipulated to by the defense, was the one listed on the payroll records.

THE DEFENDANT: 075 22 3507.

MR. ROSEN: Let the record indicate that

the defendant just stated his social security number from memory.

That's taken out of Brady because there could be a possible —

[678] THE COURT: No, it doesn't take it out of Brady. It should have been turned over.

MR. SCOTTI: I am sorry. I never considered it Brady. This doesn't show that in any way, number one. Number two, the transaction involves, as your Honor instructed the jury — it was not an illegal transaction, but merely shows — merely brought out to the jury to show the expenditures of cash.

THE COURT: How come you didn't use it?

MR. SCOTTI: Pardon me?

THE COURT: Why didn't you use it.

MR. SCOTTI: Why didn't I use what?

THE COURT: This evidence?

MR. SCOTTI: Well, your Honor, some things I was hoping to save for cross-examination. I had what I thought to be a sufficient amount of evidence.

THE COURT: The next time you will know better.

MR. SCOTTI: Well, maybe if we had a different jury we wouldn't be here.

MR. ROSEN: I most respectfully — it looks like a 7. I most respectfully submit that this is — the most clearest example of Brady against Maryland that I have seen in the 12 years I have been privileged to be in this courtroom. This is a statement from a man [679] who the Government claims stole $100,000 or $800,000 and here is a statement he signed with his name to the Internal Revenue Service that he's converting $100,000 of his alleged hot money into a bank check. If that's not Brady —

MR. SCOTTI: I don't understand how that tends to extricate the defendant from the charge.

THE COURT: Excuse me.

Are you finished?

MR. ROSEN: I am almost finished, your Honor.

Q. Did you also state under oath before the Grand Jury, Mr. Mullins, that you were aware of property that Mr. Walker had purchased in 1971 and 73 up in Granville and Mayfield, New York? A. Yes.

Q. You told the Grand Jury all that?

Did you also tell the Grand Jury that during your financial or your investigation into his

financial affairs you discovered a purchase of stock from a company called Advest? A. Yes.

MR. ROSEN: I represent to your Honor that I would have brought out much more financial — let me withdraw that. Because I made a decision not to put Mr. [680] Walker on the stand, I would have utilized the guts of the inspector's investigation to back up —

THE COURT: You have the deeds. The deeds were put into evidence.

MR. ROSEN: I have much more.

THE COURT: Don't the deeds show the dates?

MR. ROSEN: Not the stock certificates. The deeds to [sic]. But there were stock transactions and other transactions. I do most respectfully state to your Honor that this material was substantially useful to the defense. I could have used it. I would have gone into it whether your Honor thinks I would have hurt myself. That's a judgment for the jury.

THE COURT: Certainly.

MR. ROSEN: But I say I would — I represent in good faith I would have gone into a lot of these matters. And I think they are matters directly in point to the Government's case.

THE COURT: I accept your statement.

And I reiterate my statement to the Government that the Government's tactics in this case involving this stuff, this kind of information until the last minute, was in the Court's opinion — was not defenseable [sic]. However, based on my analysis of the testimony, I find [681] beyond any reasonable doubt that this information could not have affected the verdict except make a verdict of guilty more probable.

MR. ROSEN: I most respectfully disagree.

Now, I renew my application on the basis of the violation of Brady against Maryland on that tax form which I say would have allowed me to show the jury and have the jury take that with them perhaps in deliberation, a matter which indicates clearly a lack of consciousness of guilt and could have — perhaps have made a big difference here. If a man fills out a Government form — and again that would bolster my argument that this was not some secret, clandestine transaction, but open and above board at a bank and signing an I.R.S. form.

THE COURT: Yes, it's a good argument.

MR. SCOTTI: I don't see how it's the Brady. I don't see how it exculpates this defendant.

THE COURT: I believe it does.

MR. SCOTTI: I don't. I would respectfully disagree with your Honor in that regard, number

one. Number two, even assuming for the sake of argument that it did somehow under some stretch of the imagination, come under Brady, this is something certainly which was [682] not exclusively known to the Government. Mr. Walker certainly has prepared this trial with Mr. Rosen. And I am sure Mr. Rosen is a very capable attorney and he asked him about all these things. He certainly knew about the extent —

THE COURT: Are you aware of the fact that he had made an I.R.S. —

MR. ROSEN: I believe I asked the witness Kershaw, if I'm not mistaken.

[683] THE COURT: Did you ask your client? Did you know from your client?

MR. ROSEN: I knew from my — not about that IRS.

THE COURT: You didn't know?

MR. ROSEN: I knew from my client that forms were executed. And I think I asked Mr. Kershaw — it was something given to the Government. I asked Mr. Walker, did you have to sign anything down at the bank. I believe I was told that he did sign some papers. That was the basis of my question.

THE COURT: Did you know that an IRS form was —

MR. ROSEN: I can't say to your Honor that I did. I am now standing here and I think I had a basis for asking that question, and that some form was signed. I am not sure it was this IRS form. I have to be as candid as I can.

THE COURT: All right. Well, it's a good argument, I think. But on the whole, I think that the evidence was so detrimental that it really doesn't make any difference.

MR. ROSEN: You mean the evidence — the totality of the Government's proof?

THE COURT: No. This piece of evidence was [684] so detrimental to the defendant that I can't say that a violation of the Brady rule warrants a mistrial.

MR. ROSEN: Is your Honor saying that because the last digit may be a five or a seven?

THE COURT: Not maybe. Clearly a five.

MR. ROSEN: Is that why your Honor is holding it detrimental to Mr. Walker?

THE COURT: Yes, I believe so.

MR. ROSEN: I don't — I don't understand. I most respectfully disagree with your Honor as to the benefit I could have gotten out of this document.

THE COURT: It's debatable. It's a more debatable point than the rest.

MR. ROSEN: Thank you.

THE COURT: And I reiterate that the Government's tactics are holding back material to the last minute and not revealing the full file —

MR. SCOTTI: Well, your Honor —

THE COURT: — is not in the Court's opinion justified and leads to this kind of thing, the Court's time on hearings and retrials that are intolerable.

MR. SCOTTI: For the record, there's no [685] question about the fact that I should have given Mr. Rosen the Grand Jury testimony of Mr. Mullins. There is no question about that. I was wrong.

I do take exception to your Honor's characterization of it as a tactic. It was not done intentionally. It was not done willfully. It was not done with any intent to gain any kind of advantage. It was completely inadvertent because of the circumstances of what was going on at the time.

THE COURT: I don't agree.

MR. SCOTTI: I am sorry.

THE COURT: The whole tactic of holding things up to the last minute instead of opening it up and showing it so the defendant can prepare

the case, so we don't have this nonsense — if you have a case against the defendant as you did here, there's no reason for holding this.

MR. SCOTTI: Whether or not there is a reason — whether or not there is a reason, the law specifically provides that I do not have to give anything —

THE COURT: I know what the —

MR. SCOTTI: Until after the witness testifies. [686] I don't understand how your Honor can characterize it as a tactic with some venal purpose.

THE COURT: Because I don't believe that a prosecutor should use the law to withhold information, even though technically he is entitled to do so.

MR. SCOTTI: Well, your Honor, that may be true. That might be a philosophical point or a point that Congress may want to change. But I don't see the proposition that if you abide by the law you should be — or you can be held accountable to it.

THE COURT: You continue to abide by the law, Mr. Scotti, with your colleagues and we will continue to have mistrials, reversals and activities of waste of the Court's time such as this.

Now, they want to hear Marchione's testimony.

MR. SCOTTI: The whole —

THE COURT: That's what they say.

THE CLERK: Jury note marked Court Exhibit 14.

THE COURT: Call the other case.

I think the oil people better go out to lunch. I am sorry. 2 o'clock. I have to have this matter straightened out. Make it 1:30. Maybe we can start then.

[687] Try to pick out, gentlemen, if you would, the testimony dealing with his statement.

MR. ROSEN: I am sure that's what they really want.

THE COURT: They may want the whole thing.

MR. ROSEN: All right, we will pick out the statements.

(Recess taken.)

[688] THE CLERK: U.S.A. versus Walker

THE COURT: Have you agreed?

MR. SCOTTI: I don't know.

THE COURT: How much longer will you be?

MR. SCOTTI: Mr. Rosen is in the attorney's lounge looking through it.

THE COURT: Let's try to come to an agreement shortly so we can move ahead, shall we?

MR. SCOTTI: I don't understand really the jury's note. It appears they want all of Marchione's testimony.

THE COURT: I will ask them when they come in had they want all of it or just the point relating to his statements to the Government.

MR. SCOTTI: Very well.

THE COURT: I'll ask them.

MR. SCOTTI: Very well.

(Pause)

MR. ROSEN: Might I take one more moment to make an additional infinitesimally brief argument if your Honor would admit Goverment's Exhibit 19 for identification as a defendant's exhibit I? I would have been able to point out, your Honor, that the instrument bears Mr. Walker's correct address and with great specificity been able to show and argue that the last digit which [689] apparently is error, the number five, does not compare with the other fives, I would be able to demonstrate that and

there is the same slant on the top of this five which resembles the other sevens.

I might have been able to argue the man might not remember all the digits of the social security number. I think it would be extremely helpful to me.

THE COURT: It's possible. I think that is a good argument. I'm almost persuaded by it. I think it's very sound; but let's read the testimony.

MR. ROSEN: We have agreed on the bulk of it. Mr. Scotti and I disagree on some areas.

MR. SCOTTI: Maybe we should come to side bar so we can show your Honor what we are talking about."

* * *

[Commencing at page 699]

* * *

". . . should not now be discharged?

MR. ROSEN: None.

MR. SCOTTI: None, your Honor.

THE COURT: Thank you, ladies and gentlemen for all your help. Good night. You can discuss this or not as you feel free with anyone.

Excerpts of Trial Transcript Dated January 4-5, 1977

THE FOREMAN: Good night. Thank you.

(Whereupon, the jury retired from the courtroom.)

THE COURT: I have carefully reconsidered the Brady argument and I find it without any substance at all. I believe beyond any reasonable doubt that it would not have any impact at all on this verdict. That had that issue been opened, it would have served only to reinforce the proof of the Government. The issue was at best cumulative. The defendant was given full opportunity beyond the requirements of any rules of procedure or evidence to bring to the jury's attention that these activities took place in the open. And as to this very instance, that was established fully with the assistance of the Court.

MR. ROSEN: I respectfully except.

THE COURT: Yes. However, I would be happy to receive briefs on this and on the 3500 issue at the time of sentencing.

Do you wish to make a motion to set aside the . . . ."

* * *

GRAND JURY TESTIMONY OF EDMOND MULLINS DATED AUGUST 17, 1976

UNITED STATES GRAND JURY

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

DAVID WALKER

225 Cadman Plaza East
Brooklyn, New York

August 17, 1976
10:00 a.m.

APPEARANCES:

GAVIN SCOTTI, ESQ.,

Assistant United States Attorney

ELLIS TREMPER

Acting Grand Jury Reporter

[Commencing at page 2]

"EDMOND MULLINS, called as a witness, having been first duly sworn by the Foreman of the Grand Jury, testified as follows:

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BY MR. SCOTTI:

Q. Please state your name for the record. A. Edmond H. Mullins.

Q. How are you employed? A. Postal Inspector, United States Postal Service.

Q. How long have you been a Postal Inspector? A. Five and a half years.

Q. During the past several years, have you been assigned to any particular location by the Postal Service? A. For the last two years I have been assigned to the Airport mail facility at John F. Kennedy Airport.

Q. Does that cover Building 179 of the Airport facility at JFK Airport? A. Yes, it does.

Q. Explain or describe the duties of a Postal Inspector to the ladies and gentlemen of the Grand Jury. A. A Postal Inspector investigates violations of Postal law as well as performing audit functions within the Post Office.

Q. I take it that violations of Postal law would include infractions committed by Postal employees during the [3] performance of their duties? A. That's correct.

Q. I direct your attention to the early part of September of 1975. In approximately the first

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week of 1975, during that time, did you have occasion to meet one Anthony Short? A. Yes, I did.

Q. Tell the ladies and gentlemen of the Grand Jury how that came about. A. At the request of an attorney, Mr. Allan Salzman, S-a-l-z-m-a-n, Inspector Gerry Gaughran, G-a-u-g-h-r-a-n, and myself met Mr. Short in the law office of Mr. Salzman, located at 325 Broadway, Manhattan, on September 7, 1975. At that time Mr. Short related to me a conversation that he had had with David Walker in which David Walker had attempted to enlist, Mr. Short said, in taking a registry mail pouch from the Airport mail facility at JFK Airport.

Q. Did you know at that time who Mr. Short was? A. At the time I walked into the lawyer's office, I did not know who he was.

Q. Did Mr. Short in some way identify himself? A. Yes.

Q. How did he identify himself? A. He gave me his name and told me where he was employed and what his duties were.

[4] Q. What was that? A. He was an assistant ramp clerk at JFK Airport, employed by the United States Postal Service.

Q. Did he have any Postal Service identification on him? A. No. he did not.

Grand Jury Testimony of Edmond Mullins Dated August 17, 1976

Q. Subsequent to this meeting, did you verify the fact that Mr. Short was and is in fact a Postal Service employee? A. Yes, I did. An assistant ramp clerk at Kennedy.

Q. Could you describe for the ladies and gentlemen of the Grand Jury what an assistant ramp clerk does? A. He would bring mail that had missed a normal dispatch out to meet various airlines for connecting flights. Also driving around the ramp area and making sure the mail is secure.

Q. What is the ramp area? A. The ramp area is that portion of the airport that is not runways, where the airplanes park and taxi into buildings or terminals to unload passengers and pick up baggage.

Q. To facilitate these duties would he have to drive a vehicle? A. Yes, he would.

Q. In other words, is it accurate to state that as a normal course of Mr. Short's dutues [sic] he would be in a vehicle driving literally all over the airport? [5] A. That is correct.

Q. Would his duties take him to Building 179? A. Yes, they would.

Q. You started telling us about the conversation which Mr. Short related to you. Would you please continue with that? A. Mr. Short told me he had been approached by a

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foreman at Building 179, David Walker, and that David Walker had attempted to enlist his aid in stealing mail from Kennedy Airport, that his job would be to take a pouch of mail from Building 179 and meet David Walker at a predesignated spot and give the bag to Mr. Walker. And for these actions he would receive $100,000.

Q. Who was present on September 7th when Mr. Short was telling you this? A. Inspector Gaughran, Allan Salzman, Anthony Short and myself.

Q. Did Mr. Short say anything with regard to the — did he tell you where the conversation took place with Mr. Walker? A. He told me the conversation initially took place in Building 179 at Kennedy Airport. He then told me he had a subsequent conversation with Mr. Walker over a telephone, and he told me that he realized his story seemed rather incredulous and that so that somebody believed him, he made a tape [6] recording of this telephone conversation.

Q. Did he tell you when this telephone conversation took place? A. He told me that the telephone conversation had taken place the previous week.

Q. Was the telephone conversation the same day that he had the face-to-face conversation with Mr. Walker? A. I believe it was later on the same day.

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Q. Did Mr. Short have the taped conversation with him on the 7th of September? A. Mr. Short had a copy of the taped conversation with him, and he furnished it to me.

Q. Did there come a time when you received the original taped conversation from Mr. Short? A. Yes.

Q. Did there come a time when you learned how Mr. Short made this taped conversation, off what equipment? A. Yes, Mr. Short made the original recording over a Phonemate which is a recording device attached to a telephone.

Q. When you call up on the phone and someone says, 'Hello, this is X, I'm not here but leave a message at the tone,' something like that? A. That is correct.

Q. Did you listen to the original and the copy — [7] A. Yes, I did.

Q. — of the tape? A. Yes.

Q. Do you have a tape for us here today? A. I have a copy of the tape that Anthony Short had given me on September 7th.

Q. In other words, this is a copy of the copy? A. This is a copy of the copy that Mr. Short gave me. I made the copy that I am going

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to play, in my office the morning after I had received the copy of Mr. Short's tape.

Q. This tape, then, is a conversation between Anthony Short and David Walker? A. That is correct.

Q. Now, before you play the tape, could you tell us if Mr. Short — or how it came to be that Mr. Short called David Walker; did he explain to you why he called him and made the tape? A. He didn't want — he told Mr. Walker he didn't want to discuss this type of thing in the Post Office, there might be people listening or people that could overhear.

Q. Would you please play the tape for the ladies and gentlemen of the Grand Jury and identify for them the voices of Mr. Short and Mr. Walker? A. The voices should be self-explanatory. They refer [8] to each other by name, Dave and Tony.

MR. SCOTTI: Before the Inspector plays the tape, it's a small machine. If anybody can't hear the tape, raise your hand, and we'll try to turn up the volume.

We'll put it in the middle of the room. I'll start it out at the maximum volume. Sometimes I may have to cut it back a little bit.

[Whereupon, a tape recording was played to the Grand Jury.]

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BY MR. SCOTTI:

Q. Inspector Mullins, did you listen to the tape that you have just played for the Grand Jury, on September 7, 1975? A. Yes, I did.

Q. What, if any, action did you take or other Postal Inspectors take with regard to the information and tape which Mr. Short gave to you? A. We instituted a surveillance on the days that Anthony Short and David Walker were working in the Post Office at Kennedy Airport.

Q. This surveillance was instituted at Building 179 at Kennedy Airport, that is your surveillance was instituted only on days when Mr. Walker and Mr. Short were assigned on duty, is that correct? A. Initially, that is correct.

[9] Q. How long did this surveillance continue? A. The surveillance continued until December, '75, when the foreign dispatch unit moved out of Building 179 to an aircraft hangar that we get every Christmas because the mail volume increases.

David Walker was the foreman of the foreing [sic] dispatch, and he went with it.

Q. He went with it? A. Yes.

Q. Now, why would that necessarily have to curtail the surveillance? A. Because in the

Grand Jury Testimony of Edmond Mullins Dated August 17, 1976

building where the foreign dispatch was handled, there is no facility for observation.

Q. Now, did there come a time when you received information concerning the disappearance or loss of certain parcels? A. In January of 1976 I received a reclamation, which is a tracer form and claim for ten insured parcels.

Initially, I received the reclamation for five matured parcels, and about a week later I received reclamations for another five insured parcels.

Q. What was indicated on these reclamation forms? A. The Bank Nazionale Del Lavaro in Milan, Italy, had made ten insured parcels. The numbers were: 42, 44, 46, 48, 50, 542, 544, 546, 548 and 550, to the Irving Trust Company [10] on One Wall Street, New York, New York.

Q. Did the forms state what was contained inside the ten parcels that had been mailed? A. Each of the ten parcels contained $80,000 in United States currency.

Q. Were these registered parcels? A. These were insured parcels coming into the United States. The procedure at Kennedy Airport is that insured parcels from Italy are entered to the registry section.

Q. Now, with respect to Parcels 42, 44 and 46, did the bank in Milan give you a breakdown

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as to the kinds or type of United States currency that was in each one of the parcels? A. Yes, they did. 42, 44 and 46 each contained $80,000, had an identical breakdown in United States currency. One hundred $100 bills, one thousand $50 bills, and one thousand $20 bills, for a total of $80,000.

Q. In each one of the three parcels? A. Yes.

Q. What about Parcel No. 48? A. 48 contained seven hundred $100 bills, five hundred $10 bills, and one thousand $5 bills.

Q. What about Parcel No. 50? A. That contained eight hundred $100 bills.

[11]Q. With respect to Parcel No. 542? A. 542 contained five hundred $100 bills, eleven hundred $20 bills, one thousand $5 bills, and three thousand $1 bills.

Parcel 544 contained five hundred $100 bills, one thousand $20 bills, and two thousand $5 bills.

Parcel No. 546 and 548 contained the identical breakdown, and 544 I have not received a breakdown for. The bills in Parcel 550 —

Q. Have you been advised that that parcel also contained $80,000? A. I have the reclamation which showed it had $80,000 in United States currency.

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Q. Now, did there come a time when you received further information concerning lost or missing parcels from the registry room? A. Yes, during my investigation I determined that the ten parceis I previously mentioned had been received at Kennedy Airport and dispatched 179/CPV, which is an insured parcel dispatch from Rome, Italy.

It arrived on El Italia Flight 610 of September 21, 1975. It was properly received for in the exterior room at Kennedy Airport. When the dispatch was opened, the articles were entered in the value cage, a secure cage within the [12] registry room, at 4:30 in the morning of September 22, 1975.

I obtained a bill from the vault clerk — from the vault and determined that these parcels were in turn listed along with two other parcels in a mail bag that was destined for the Chruch Street Station.

The other two registered, 30633/1 and 30633/2, from Grenada. My investigation determined that these parcels were made by the Royal Bank of Grenada, St. George, Grenada, British West Indies, to Chase Manhattan Plaza, a Chase Manhattan Bank, New York, New York. These contained a total of $5,291 in United States currency.

Postal 30633/1 contained $4,000; and 30633/2 contained $1,291.

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Q. With regard to your investigation, did you determine who the last Postal employee was in the chain of events to handle these 12 parcels? A. Yes, all parcels were signed out of the vault by Clerk Helen Helton who was a clerk who works in the GPO dispatching area, an area that these parcels would be placed in a mail bag and send onward for dispatch.

Q. In connection with this investigation, did you determine who else was on duty on the night or early morning of September 22, 1975? A. The foreman of the registry room on that day was [13] David Walker. I found all 12 parcels listed on a bill for Church Street Station. The next step in procedure in the registry room would have been for the bag itself, which is identified by a rotary lock number, to be listed on another bill going to GPO New York. We searched all of the records, and there is no record of that rotary lock ever being listed on the bill going anywhere from Kennedy Airport.

Q. Was that bag ever received at GPO or Church Street? A. No, none of the parcels were received by the addressees.

Q. Have any of those parcels turned up to date in the Post Office or in — A. None of the parcels have turned up.

Q. Based on this information that you knew at this time in January of 1976, what if any investigation did you then conduct? A. I

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conducted an investigation of David Walker and Helen Helton.

Q. With regard to David Walker, what kind of an investigation did you conduct? A. I conducted an investigation into his finances.

Q. Was that to determine if he was spending large amounts of money? A. It was.

[14] Q. What was the result of that investigation in terms of expenditures of money by David Walker? A. It disclosed on or about October 14, 1975, a payment of $1,440 was made on his Bankers Trust BankAmericard at the Union Hall Street branch of Bankers Trust Company, Jamaica, New York.

Q. How was that payment made? A. The method of payment was in cash according to the Bankers Trust Company. My investigation further revealed on or about October 28, 1975, David Walker purchased a garden tractor from the South Hartford Equipment Company in South Hartford, New York, in the sum of $2,250 in cash.

On or about December 30, 1975, a Ford Elite was purchased by David's wife, Modestine Walker. The purchase price consisted of a trade-in of another car and $4,198 cash.

On or about the 6th of January, 1976, David Walker purchased several apartment buildings

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for the sum of $500,000 from the Republic Company located at Six Grand Avenue, Great Neck, New York; and as the downpayment on this he paid $100,020.49 in the form of a check that he received from a bank after turning in the identical amount in cash.

Q. With regard to this purchase of buildings, did you yourself conduct the investigation there, or other Postal Inspectors? [15] A. This was conducted by other Postal Inspectors.

Q. Was that Inspector Caldwell and Inspector Gaughran? A. Yes.

Q. Were the attorneys at the closing for this sale of these apartment buildings, were they interviewed? A. They were.

Q. What if any information was related to Inspectors Caldwell and Gaughran which was then related to you? A. At the time of closing when it came time to produce a certified check or cash to close the deal, David Walker opened his briefcase and dumped a pile of cash on the table which was described as the biggest amount of money that anybody had ever seen.

Q. Who described it as such? A. Both of the attorneys, I believe. At that point he was told to take the cash out of there and get a certified check for it.

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He took the cash to a bank, and got a certified check for it. The people at the bank who counted the money were interviewed. They verified it was David Walker who brought the cash in and received a certified check for it.

He then returned to the closing and consummated the deal.

Q. Now, was there any record that you discovered during [16] the course of your investigation which would indicate the amount of cash which David Walker brought into the bank? A. Yes, there was an IRS form filled out by David Walker indicating the amount of cash.

Q. Which was? A. $100,020.49.

Q. Now, did your investigation continue? A. Yes, it did. My investigation continued and showed that on January 29, 1976, David Walker went to E. Koppel, Incorporated, Jamaica, New York, which is an automobile dealership, and put $500 cash as a deposit on a Jaguar XJ-6.

On the 5th of February, David Walker returned and put down $15,000 in $50 bills on the same car. Two days later on the 7th of February, he returned and put down $428 in cash for the insurance for the vehicle.

Q. Were the people at Koppel Motors interviewed? A. They were.

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Q. Did they state that the payment was made in cash? A. They did.

Q. Did your investigation continue after that? A. It did.

Q. Tell us what, if anything, was discovered. A. My investigation revealed that on February the 19th, 1976, Helen Helton purchased a Thunderbird from Superior Ford, [17] Jackson Heights, New York. She traded in her car. David Walker handed the salesman $5,000 in cash, and Helen Helton financed the rest of the purchase price over three years.

Q. With regard to the purchase of the Thunderbird by Helen Helton, I take it David Walker accompanied her to the car dealership? A. That is correct.

Q. Was this transaction observed by Postal Inspectors? A. Yes. The money was observed to come out of David Walker's pocket.

Q. Who were the Postal Inspectors who observed this? A. I don't recall at this time.

Q. Do you have your notes with you? A. No, I don't.

Q. Now, with regard to your investigation of David Walker and Helen Helton, did you determine whether or not David Walker owned any property? A. Yes, I did.

Grand Jury Testimony of Edmond Mullins Dated August 17, 1976

Q. Where was that property located? A. He had property in two locations: Granville, New York, and Mayfield, New York. This is in additions [sic] to the lot he had owned in St. Albans that he had purchased.

Q. Was this property purchased in 1971 and 1973 by Mr. Walker? [18] A. The property in Granville was purchased in 1971. I believe that Mr. Walker and his wife purchased a portion of that property from his partner in a larger land deal in 1973.

Q. Now, did your investigation of Mr. Walker continue with respect to any stock transactions which he may have engated [sic] in? A. Yes.

Q. Tell us about that. A. Mr. Walker had purchased stock from two stock brokerages, one was Advest. The name of the other one I don't remember, but the individual that he purchased it from was named Lomare. Mr. Lomare was an employee at Kennedy Airport.

Q. Postal Service Employee? A. Yes, at Kennedy Airport.

Q. Was Mr. Lomare interviewed? A. Mr. Lomare was interviewed by E. A. Caldwell.

Q. By the way, do you recall how to spell Lomare? A. L-o-m-a-r-e, Vincent.

Grand Jury Testimony of Edmond Mullins Dated August 17, 1976

Q. Did Mr. Lomare tell Inspector Caldwell how much stock Mr. Walker purchased? A. He did.

Q. What was that? A. He stated that he bought 200 shares of Pan Am stock [19] for a total of $11,021.68. He wanted to know if Mr. Lomare would take cash or a check. Mr. Lomare said he would take the cash. And he gave him the $11,025 in hundred-dollar bills, some fifties, twenties and tens, mostly hundreds.

Q. David Walker gave Mr. Lomare cash? A. That is correct.

MR. SCOTTI: I have no further questions of this witness at this time. May the witness be excused?

Mr. Foreman, does anybody have any questions?

BY MR. SCOTTI:

Q. During the course of your investigation, did you determine the annual salary of David Walker? A. Yes, I did.

Q. What was that? A. His annual salary at the time of his arrest was approximately $18,000 a year.

Q. Do you know whether or not his wife is employed? A. His wife is employed. I believe

Grand Jury Testimony of Edmond Mullins Dated August 17, 1976

she's a nurse for the City of New York. I was not able to determine her salary.

MR. SCOTTI: I have no further questions. Does anybody else have any questions?

[No response.]

THE FOREMAN: You are excused.

[Witness excused.] [Time noted: 11:00 a.m.]'

GOVERNMENT'S EXHIBIT 19 — IRS FORM 4789

Form 4789
April 1972
(Replaces TCR-1)
Department of the Treasury
Internal Revenue Service

File a separate report for each transaction
(Complete all applicable parts—see instructions)

NO

Part I Identity of person who conducted this transaction with the financial institution

Name (Last, first and middle initial): DAVID WALKER
Social security number: 075-12-3605
Number and street: 183-35 121st Ave.
Business, occupation or profession:
City or town, State and ZIP code: ST ALBANS N.Y. 11434

Part II Person or organization for whom this transaction was completed (Complete only if different than Part I)

Name:
Identifying number:
Number and street:
Business, occupation or profession:
City or town, State and ZIP code:

Part III Description of transaction (If additional space is needed, attach a separate schedule)

1. Nature of transaction (check the applicable boxes)
   - ☐ Deposit
   - ☐ Withdrawal
   - ☐ Currency exchange
   - ☐ Check cashed
   - ☒ Check purchased Oct. # 979277
   - ☐ Traveler's checks purchased
   - ☐ Security purchase (specify)
   - ☐ Other (specify)

2. Total amount of currency transaction (in U.S. dollars): 100.020.49
3. Amount in denominations of $100 or higher: 100.00
4. Date of transaction (Month, day and year): 1/6/76

5. If other than U.S. currency is involved, please furnish the following information:
   Currency name | Country | Total amount of foreign currency

6. If a check was involved in this transaction, please furnish the following information (See instructions):
   Date of check: 1-6-76
   Payee: DAVID [illegible]
   Drawer of check:
   Drawee bank and City of location: CHASE MANHATTAN BANK

Part IV Type of identification presented in this transaction

By customers:
- ☐ Savings account number
- ☐ Checking account number
- ☐ Share account number
- ☐ Loan account number
- ☐ Safety deposit box number
- ☐ Other (specify)

By others:
- ☐ Driver's permit — State — Number
- ☐ Passport — Country — Number
- ☐ Alien ID card — Country — Number
- ☐ Other (specify)

Part V Financial institution reporting the financial transaction

Name and address:
Identifying number (see instructions):
Business activity:

Sign here ▶ ..... Authorized signature — Title — Date

BEST COPY AVAILABLE

SENTENCING MINUTES DATED MARCH 11, 1977

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76-CR-547

UNITED STATES OF AMERICA,

-against-

DAVID WALKER,

Defendant.

United States Courthouse
Brooklyn, New York

March 11, 1977

B e f o r e :

HONORABLE JACOB WEINSTEIN, U.S.D.J.

DOLORES OLARNICK
ACTING OFFICIAL COURT REPORTER

[2] Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: GAVIN SCOTTI, ESQ.
Assistant U. S. Attorney

Sentencing Minutes Dated March 11, 1977

MICHAEL ROSEN, ESQ.
Saxe, Bacon & Balond, P.C.
Attorney for Defendant

[3] COURT CLERK: Criminal Court for sentencing, United States of America versus David Walker, Indictment No. 76-CR-547.

MR. ROSEN: Good morning, Your Honor.

THE COURT: Mr. Rosen, have you had an opportunity to read the presentence report?

MR. ROSEN: I have, Your Honor, and I take exception to certain —

THE COURT: Excuse me. Have you had an opportunity to discuss it with your client?

MR. ROSEN: Yes.

THE COURT: I will hear you.

MR. ROSEN: Your Honor, I take exception to the inference raised in the presentence report that the postal inspectors have some insight that Mr. Walker may have been participating in other postal thefts over the years or whatever they seem to be inferring.

THE COURT: Let's find out.

Sentencing Minutes Dated March 11, 1977

Mr. Scotti, do you have any hard proof on that?

MR. SCOTTI: No, Your Honor.

THE COURT: Then I will ignore that.

MR. ROSEN: I also take exception to the type of characterization such as master-minded, [4] as that is just phraseology, I take exception to the characterization and say the facts don't bear it out; but for that, Judge, I do not have any others.

THE COURT: Ignore the characterization.

MR. ROSEN: Thank you, Your Honor.

Is Your Honor amenable to hearing a brief comment on the motions which I made?

MR. ROSEN: I haven't received any reply from the government. Apparently, they wish to rest on the record of Your Honor's prior determination.

I think most respectfully, the papers show one thing and I am, again, Your Honor you may be totally aware of 606 and all its ramifications, but I am trying to persuade Your Honor that there is not an instance where we are seeking through jurors statements to impeach their verdict. Your Honor has recognized in your treatise which was recently delivered to the office,

that it is permissible under certain circumstances to show extringent pressures on the jury.

For example, a prejudicial newspaper article. I am submitting to Your Honor that it is equally permissible to show that their failure to be exposed [5] to something which most respectfully, I submit, they should have been exposed to permits, at least, Your Honor to consider the statements.

Now, Your Honor may consider them and then reject them; I am trying to get to first base. Your Honor does have a right to consider the fact that material which I submit is material under the case and it should have been allowed to be put in front of the jury and let them determine it.

I also want to say about this particular form, I did not have any knowledge of the form during the trial. Your Honor will remember during Mr. Kirshowiz' examination, I had examined the witness as to whether a lawyer had told Mr. Walker that that transaction had to be reported. Your Honor directed the witness not to answer the question. I tried to briefly dissuade Your Honor from that position and Your Honor said move on to something else.

THE COURT: That didn't prevent you from talking to the witness outside the Court. What I allowed to go before the jury is not necessarily what you were prevented from or were allowed to do [6] outside the court in

examining and preparing witness. Those witnesses were not hostile to the defendant and it was clear to the Court that they would have consulted with you and told you what you wanted to know. That whole incident was available to the defendant as it was to the government. You could have investigated it thoroughly.

As a matter of fact, your access to that incident was far better than the government, because you had your client and all of the people involved would have been happy to talk to you. It is clear from the context of that that your client had a full file on it and so did everybody else who would have been available to you.

MR. ROSEN: We are talking about an incident where a person goes to a bank with a cash transaction. The bank requires that person to sign a form. To my knowledge, and I may be mistaken, one copy is signed. Mr. Walker never had a copy —

THE COURT: Did you subpoena the bank?

MR. ROSEN: I don't know about the bank. I knew —

THE COURT: You knew about it.

MR. ROSEN: They converted a bank check.

Sentencing Minutes Dated March 11, 1977

[7] THE COURT: You knew about it, at least at the time of the trial, your client knew about it. Your client is a highly intelligent person. I saw him consulting with you constantly during the trial. I am not going to accept those disclaimers of knowledge as though you were dealing with an infant.

MR. ROSEN: Well, Judge, if the issue is whether that material was known to the defense, the answer is no. Your Honor is saying that it should have been known.

THE COURT: I don't credit that.

MR. ROSEN: Well, I am making that representation that I did not know about it.

THE COURT: It was fully known to the defendant.

MR. ROSEN: I submit, Your Honor, there was no copy of this form.

THE COURT: The material was all open, the incident was all open. I don't see any neglect on the part of the government. I am not critizing you as counsel, I think you did a very fine job.

You have a very [sic] client and I believe he turned over to you what he wanted to turn over to you.

[8] MR. ROSEN: Beyond that, I just wish to call to the Court's attention, the Court's own

Sentencing Minutes Dated March 11, 1977

comments during the trial prior to the verdict of the jury. I think clearly we have a situation of Brady material, a situation where in fairness to the defendant, it would have made a difference, it could have certainly reasonably made a difference in this trial.

I am also talking about Inspector Mullins' testimony. My papers are there and I would like to incorporate them as part of the record and urge Your Honor to do two things to set aside the verdict on the ground that the defendant has been deprived of a fair trial under violation of the due process clause and, secondly for a new trial under Rule 483, on the grounds of newly discovered evidence that incorporates and includes Inspector Mullins' testimony under Rule 3500 to produce this type of information by the government.

THE COURT: The defendant complains that Brady material was not furnished. Apparenlty [sic], in connection with a purchase of real state, [sic] the defendant filled out an Internal Revenue Service form which was supposed to indicate his Social [9] Security Number. The existence of this form allegedly became known to the defendant's counsel for the first time only after the Grand Jury testimony of United States Postal Inspector Edmund H. Mullins was turned over to the defendant. The jury had already begun its deliberations by that time. Counsel for the defendant argues that this form was exculpatory evidence because it tended to show that Mr. Walker conducted a large cash

transaction in a totally open and public manner, even going so far as to report it to the IRS.

It is doubtful that this was Brady material. The Social Security number given was not actually the defendant's, because one of the digits was incorrect. A computer has no imagination, and it would not have turned up the defendant's name if the Social Security number, as written, was fed into it.

In any event, this evidence was merely cumulative. The summation, beginning at Page 555 of the record, indicates that the defendant's argument to the jury, as well as the evidence itself, made it clear that use of large amounts of cash for the purchase of the apartment buildings, with which [10] this form was connected, was completely open; the cash was turned over to the bank in return for a certified check. This incident was fully known to defense counsel, defense counsel had available the defendant's records, defense counsel had available the various witnesses to the incident and all the records of the attorneys and others who participated in the incident.

This form was filled out by the defendant. There is no showing that he did not have a copy in his files or that he was not, at least, fully aware of its existence, or that he could not have obtained a copy by the ordinary processes of subpoena and investigation. The defendant had available to him subsequent evidence showing a full investigative team which interviewed the jurors and there is no reason why he couldn't

have used that team for this kind of elementary pretrial discovery of materials.

The probability is that no mention of the IRS Form was made by the defendant during the trial because it was believed that this was inculpatory rather than exculpatory. I don't say that the defense counsel necessarily knew it, I accept his statement that he did not know, but I believe that [11] that the defendant himself knew it and deliberately, therefore, kept it away.

It is also claimed that the failure to turn over Inspector Mullins' Grand Jury testimony violated both Brady and 18 USC Section 3500. There is nothing in Mullins' testimony before the Grand Jury judged either from a transcript of that testimony or a reconstructed cross-examination beginning at Page 641 to indicate any exculpatory information. All of the technical information described by the Inspector was available to the defendant who himself was an extremely experienced supervisory employee of the Post Office with many years dealing with this subject matter.

Frequent conversations and consultations between defense counsel and the defendant when technical problems arose that were observed by the Court, indicated that both defendant and defense counsel were fully aware of all the technical investigations presented to the Grand Jury by Inspector Mullins. If defense counsel was not aware of any specific information, it was because the defendant himself didn't make it available.

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The defendant sitting at defense table was [12] clearly the best expert in the courtroom at all times with respect to those matters.

Neither is there a violation of Section 3500. In the first place, under Subdivision (b) the defendant must move for 3500 material. In this connection, the section provides, Subdivision (b), '*** after a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United Sttess [sic] to produce any statement.' No such motion was made.

In the second place, under the same provision, the materials must relate, "to the subject matter as to which the witness has testified", on direct. In this case, by direction of the Court, the direct testimony of the witness was extremely narrow. None of the material which the defendant said should have been turned over to him pertained to what Inspector Mullins said on direct examination. Rule 3500 in this connection must be read with Federal Rules of Evidence, Rule 611(b). Congress deliberately reversed the rule proposed by the Supreme Court saying that, "cross -examination should be limited to the subject matters of the direct examination and matters effecting the credibility [13] of a witness." To the extent, therefore, that provision is read with 3500, it is fairly clear as far as Congress intended it by making the witness his own on cross-examination the defendant forewent the benefits of Section 3500.

Sentencing Minutes Dated March 11, 1977

I am not suggesting that this is a desirable rule, I believe, it is an undesirable rule, but that is the rule that we have, that is 3500 as I just interpreted it.

Finally, the reconstructed cross-examination shows that the new material was cumulative and would not have assisted the defendant in any way.

The Court is convinced beyond a reasonable doubt that if all the material which the defendant claimed should have been turned over during the course of the trial, actually had been given to him, the verdict would not have been affected in any way.

To dispute this, the defendant apparently interviewed the jurors after the trial. He has supplied to the Court mimeographed statements by several of them indicating that they would, or might, have been affected in their deliberations had they known about this additional material. As indicated at the trial, and post trial sessions of the Court, [14] the Court is unconvinced that evidence of this kind is at all useful. Jurors do attempt to be agreeable, particularly when they are subjected to interrogation by someone working on behalf of the defendant, who they have found guilty, and without anyone presenting the other side of the argument. In any event, the material supplied is not to be considered by the Court under Rule 606(b) of the Federal Rules of Evidence. I should make it clear that if I had considered it, I would give it no weight at all.

Sentencing Minutes Dated March 11, 1977

The amount of deliberation by the jury was not excessive in view of the evidence, the strong arguments of defense counsel and the good physical appearance of the defendant which would ordinarily incline a jury towards him. There is simply in this Court's opinion based upon its observations of the jury, the defendant, counsel and its witnesses no basis in this case for a new trial.

In this imperfect world, the defendant received as fair a trial as it is reasonable to expect. What I have said should not be taken to indicate that I condone the practices of the United States Attorney, in this case, Mr. Scotti. I do not condone it. I believe, that at least his practice [15] was sloppy. I believe that Mr. Trager should take disciplinary action against any Assistant United States Attorney who engages in the practice engaged here which is not to turn over 3500 material in advance. We have had one reversal in a case tried by me; there have been a number of other cases, I think one, where I granted a mistrial and a new trial and we have had other cases where there are unnecessary appeals. This practice of holding back 3500 material or materials that might become 3500 for the last moment, so that hurly burly there are mistakes seems to me to be indefensable even though it is apparently permitted under the 2nd Circuit interpretation of the Statute. However, the defense counsel must in this case share the blame, because the reason for requiring the motion is to make certain that it is brought home to counsel that these materials are required.

Sentencing Minutes Dated March 11, 1977

I would say, however, in defense of defense counsel, that defense counsel tried the case in an exemplary manner and in view of the fact that other materials are turned over without such a motion as a matter of custom and practice in the court, he was probably justified in not making a specific [16] motion as to each witness.

Mr. SCOTTI: Your Honor, for the record, I would point out to Your Honor in my letter dated November 8, 1976, letter sent by me to Mr. Kulcsr, the specific names of all the people who were handling the department in this case were given to him. Mr. Rosen subpoenaed Mrs. Horowitz and then decided not to call her. Mr. Kulcsr was given an oral as well as subsequent written explanation of how these parcels came in and how they were handled, and the people who handled them.

Mr. Rosen was given in my letter dated November 24, 1976, the names of the two truck drivers and addresses about whom Mr. Marchioni testified moved the truck. Mr. Rosen wa [sic] also given a complete list of the names of all the employees in the registry section at the time of the alleged crime, including the addresses and telephone numbers of these employees.

Certainly, with all of that information that had been provided to defense counsel in advance of the trial, it seems to me that although from my own personal point of view, I must say to Your Honor, as I candidly stated in the beginning, I should have, [17] although I agree with Your

Honor's ruling, but I think to avoid any problems, I should have turned this over, I did not. I am not going into the reasons why I did not because we have been through that already; but I would like to state for the record that I think the record should reflect that all of this information which was the subject matter of Mr. Mullins' testimony about the time the parcels came in and who was going to do what, and who the employees were, was already made available to the defendant and he certainly had more than enough opportunity to explore that.

THE COURT: Have those letters been made part of the record?

MR. SCOTTI: Copies of our discovery letters were sent to the Clerk of the Court and they should be in the file.

MR. ROSEN: I have no objection to acknowledging receipt of them.

THE COURT: I make a finding that the failure to turn over certain material was not an intentional failure, it was a negligent failure.

MR. ROSEN: Your Honor, may I be heard on sentence?

[18] THE COURT: You may.

MR. ROSEN: Judge, I have gone over the presentence report and I think Your Honor has heard this case and I must state to Your Honor, that my client has authorized me to tell this to

Your Honor that consistently he has maintained his innocence as the catalyst of this scheme.

Judge, the presentence report shows basically that he was, he is, a decent man. He has led a very exemplary life. He came from a family of nine children and did bootstrap himself up to a meaningful life.

Your Honor, I heard what you did to Mr. Marchioni, the previous defendant, and I am aware that postal violations usually entail some incarceration as a deterrent factor. I can accept that. I would say to Your Honor, however, that in looking at Mr. Walker's history, his involvement with fine and charitable community projects, we are dealing with a man I don't think has shown a venal streak in his entire life. This incident stands alone, but, I understand Your Honor is just dealing with this incident. But the rest of his life should, at least, commend itself to Your Honor to be as [19] lenient, practical, compassionate as possible under all the circumstances. I think Your Honor knows this case as well as anybody and I will put Mr. Walker in your hands.

THE COURT: Do you want to add anything?

THE DEFENDANT: No, Your Honor.

THE COURT: The maximum sentence here is 10 years, but in view of the defendant's general exemplary behavior, I sentence him to three years

on each of the counts, one and two, to run concurrent. A $2,000 fine on Count One and a $10,000 fine on Count Two for a total fine of $12,000. Terms of his incarceration are concurrent. The fines are consecutive.

I assume the government will take appropriate action in view of the assets involved; a stay will be granted pending the appeal.

You have a right to appeal. If you cannot afford an attorney, an attorney will be appointed for you and paid for by the government and other course will be paid for. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

MR. ROSEN: May I advise Your Honor, that the oral direction during the trial are that all [20] assets be frozen, except for those necessary to life has been complied with. I take it, Your Honor, that — well, let me just say this: If there is an appeal, there will be some —

THE COURT: I am going to remove that stay. I will hold it.

MR. ROSEN: I'm sorry, Your Honor—

THE COURT: I will remove any stay and he can do whatever he wants. I will keep it for another five days, then he can do whatever he wants with his assets. It is up to the government to move swiftly if they want to control his assets.

They have adequate tax lien laws and other available procedures. I will not tie this man up. There is no stay of the $12,000 fine, he must pay the $12,000 fine. There is a stay of incarceration pending the appeal.

MR. ROSEN: That is what I want to understand. The fine is not stayed pending the appeal?

THE COURT: No, it must be paid within 30 days.

MR. ROSEN: One of the things I want to bring to Your Honor's attention is that if the government does take those steps and ties him all up, could Your Honor at least direct the government to permit [21] the defendant to meet whatever legal printing costs of this appeal?

THE COURT: Of course. You will have to work that out. If he doesn't have any assets, he will come in and the government will pay for the appeal.

STATEMENT OF JUROR

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it would have made a difference in my deliberations and verdict.

s/ Agnes G. Davis
AGNES G. DAVIS
147-11 130th Ave.
So. Ozone Pk., N.Y. 11436
Juror I - 1/22/77

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it would have made a difference in my deliberations and verdict.

s/ Senta Jedlicki
SENTA JEDLICKI
93-54 Queens Blvd.
Rego Park, Queens, N.Y. 11374
Juror II - 1/22/77

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it would have made a difference in my deliberations and verdict.

s/ Ms. Audrean T. Marbury
AUDREAN T. MARBURY
114-09 128 Street
Juror III
January 22, 1977

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it would have made a difference in my deliberations and verdict.

s/ Claudia V. Groves
CLAUDIA V. GROVES
901 St. Marks Ave.
Brooklyn, N.Y. 11213
Juror IV
1/22/77

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it might have made a difference in my deliberations and verdict.

s/ Sharon Dickman
SHARON DICKMAN
27-49 170 St.
Flushing, N.Y. 11358
Juror V
January 24, 1977

WITNESS:
William J. Whelan
6007 Fieldston
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it could have made a difference in my deliberations and verdict.

s/ Peter A. Stellmann
PETER A. STELLMANN
146 Oakside Dr.
Smithtown, N.Y.
Juror VI
Jan. 24, 1977

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it might have made a difference in my deliberations and verdict.

s/ Concetta Sinopoli
CONCETTA SINOPOLI
1723 Horatio Ave.
Merrick, N.Y. 11566
Juror VII
1/24/77

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it would have made a difference in my deliberations and verdict.

s/ Louis Lepler
LOUIS LEPLER
360 Cameo Dr.
Massapequa, N.Y.
Juror VIII
January 24, 1977

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

Statement of Juror

I was a trial juror in the case of *U.S.A. vs. David Walker.* After the jury had been discharged my fellow jurors and I spoke with Mr. Rosen who represented Mr. Walker at the trial. Mr. Rosen advised us that while we were deliberating the government turned over to him a document which shows that Mr. Walker reported the $100,000 bank transaction to the Internal Revenue Service. Mr. Rosen told my fellow jurors and I that Mr. Walker's correct name and address appeared on the Internal Revenue Service form as did his Social Security number except for a questionable last digit.

Had I known about such document and heard that Mr. Walker reported this transaction to the government it might have made a difference in my deliberations and verdict.

s/ Thekla L. Christopher
THEKLA L. CHRISTOPHER
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Long Island City, N.Y. 11103
Juror VIX
1/24/77

WITNESS:
William J. Whelan
6007 Fieldston Rd.
Bronx, N.Y. 10471

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s/ Joseph J. Athanasio
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1/22/77

WITNESS:
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Bronx, N.Y. 10471

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s/ Louis Thymius
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Juror XI
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No. 77-127

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1977. The petition for a writ of certiorari was filed on July 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C: 1254(1).

QUESTION PRESENTED

Whether the government violated its obligations under 18 U.S.C. 3500 or *Brady* v. *Maryland*, 373 U.S. 83, by failing to provide petitioner either with the grand jury testimony of a government witness or a form that petitioner had filed with the Internal Revenue Service.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to embezzle and embezzlement of 12 parcels of mail, in violation of 18 U.S.C. 371 and 1709.[1] He was sentenced to two concurrent terms of three years' imprisonment and was fined $12,000 (Pet. App. 6a-7a). The court of appeals affirmed (*id.* at 1a-2a).

The evidence showed that petitioner was the central figure in a conspiracy to embezzle mail parcels from the Airport Mail Facility at John F. Kennedy International Airport (AMF) in New York, where he was employed as a supervisor, and that he enlisted the aid of co-defendants Helen Helton and Rosario Marchione and other postal employees to execute the scheme. In early September 1975, petitioner had several conversations with co-defendant Helton (who was petitioner's lover) in which he solicited her assistance in stealing mail from the Registry Section of AMF, where she worked (Tr. 124-130). At approximately the same time, petitioner asked Anthony Short, a postal worker whose duties included transporting mail from the AMF to various airlines for delivery, whether he would be willing to take a bag of mail out of the airport and deliver it to petitioner in return for $100,000 (Tr. 51-52). In a telephone conversation recorded by Short, petitioner outlined the entire scheme to embezzle mail from the Registry Section (Tr. 53-54; G. X. 4), telling Short that he did not know exactly when the theft would occur since it was "gonna have to be the right time" (G. X. 4). At the behest of postal inspectors, to whom Short related this information and provided the

[1]Co-defendants Helen Helton and Rosario Marchione pleaded guilty to the conspiracy charge and testified for the government at petitioner's trial.

tape recording, Short thereafter met with petitioner to select a place for transfer of the mail bag that Short was to remove from the airport (Tr. 70-73).

Meanwhile, petitioner was completing arrangements for the theft with Helton. He instructed her to assemble a mail bag from the "valuable cage" (vault room) of the Registry Section, secure it with a conventional lock (rather than the required "rotary" lock),[2] and deliver the bag to him for removal (Tr. 129-130, 140, 243). On two occasions prior to the theft, petitioner asked Helton whether she "had anything"; her response each time was negative because she hoped that the scheme would never be executed (Tr. 132).

On September 22, 1975, petitioner was assigned to substitute for the supervisor of the Registry Section. Between 4:00 a.m. and 5:00 a.m. on that day, petitioner left his post and went upstairs to the AMF lunchroom, where he approached co-defendant Marchione, a transfer clerk, told him that a mail bag going from Miami to the British West Indies had arrived during the prior duty shift, and asked whether Marchione was willing to participate in the theft. When Marchione expressed interest, petitioner told him to go downstairs (Tr. 311-316).

Sometime after 5:00 a.m., petitioner asked Helton whether she had "heart," *i.e.*, whether she was ready to assemble a bag of mail for petitioner to remove from the airport (Tr. 134-135). Helton then went to the vault room and signed out 12 parcels of mail (Tr. 135-136, 177-181). From their markings and tags, Helton knew that ten of the parcels had been sent by banks in Milan, Italy, and that two were from Grenada, British West Indies;

[2]The numbers on a rotary lock change each time the lock is opened and closed (Tr. 121).

all 12 were destined for New York banks. Their appearance, particularly the manner in which they had been wrapped, also indicated that there was a good chance that the parcels contained something valuable, such as cash (Tr. 181-183). Helton inserted the 12 parcels in a canvas mail bag and filled out a "manifold bill" listing the parcels and (falsely) reflecting a rotary lock number as being affixed to the bag (Tr. 135-136, 138, 140).[3] Helton then placed the canvas bag on the floor beside her and indicated to petitioner that it was the one she had made for removal (Tr. 142).

Minutes later, Marchione arrived and assisted petitioner in loading a nylon bag containing a heavy canvas bag, as well as several empty nylon bags, onto a truck backed up to a flight deck (Tr. 318-323, 325-326). The truck was then moved by another employee (Tr. 326-327). After about an hour, petitioner approached Marchione and asked him to unload the truck (Tr. 327-328). As Marchione unloaded the nylon bags, he noticed that the one containing the canvas bag was no longer there (Tr. 331-333).

Later that morning, petitioner arranged to meet Marchione on a street outside the airport. As Marchione entered petitioner's automobile, petitioner told him that "he made the big one" and that Marchione and another person, whose identity petitioner refused to disclose, would each receive $30,000 (Tr. 334). Petitioner then gave Marchione a paper bag containing $22,000 (Tr. 335-336, 339).[4] On the same day petitioner gave Helton approximately $200,000 (Tr. 142-147, 159-163, 495).

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[3]Helton took home the rotary lock listed on the bill and gave it to petitioner, who disposed of it (Tr. 146-147).

[4]Marchione also found inside the bag a piece of paper marked "Attention, Chief Teller, 1 Chase Manhattan Plaza" (Tr. 337). When advised of this, petitioner told Marchione not to worry and gave him an additional $8,000 (Tr. 339-340).

Between November 1975 and February 1976, petitioner bought expensive gifts for Helton and himself and gave her large amounts of cash (Tr. 151-153, 227-228, 248). In addition, petitioner purchased a group of garden apartments for $500,000. He appeared at the closing with $100,000 in cash, which the mortgagee required him to convert to a check (Tr. 287-295; G. X. 12).

In March 1976, when Helton was interviewed by postal inspectors, she denied any knowledge concerning the disappearance of the 12 mail parcels (Tr. 155-157). Following the interview, petitioner reassured her that as long as the money was not found she could not be held accountable for the crime (Tr. 157-158). On May 17, 1976, petitioner asked Helton to give him $40,000 from her share of the thefts. Accordingly, they drove to Granville, New York, where Helton had buried her money, and retrieved the cash (Tr. 159-160, 476-483). Helton was arrested seven days later and agreed to cooperate with the government (Tr. 158, 164).

ARGUMENT

Petitioner contends that the government breached its obligations under *Brady* v. *Maryland*, 373 U.S. 83, and the Jencks Act (18 U.S.C. 3500) by withholding until after the jury had retired the grand jury testimony of Postal Inspector Edmund Mullins and a form that petitioner had filed with the Internal Revenue Service. The district court and the court of appeals rejected this contention, however, and the record wholly fails to support it.

1. While the jury was deliberating, government counsel realized that he had inadvertently failed to provide petitioner with the grand jury testimony of Postal Inspector Edmund Mullins after Inspector Mullins had testified on

direct examination (Pet. App. 54a-55a).[5] Immediately following this discovery, defense counsel was given the material and was permitted to re-examine Inspector Mullins out of the jury's presence to determine what additional facts he would have been able to develop with the use of the grand jury testimony (*id.* at 64a-91a). Following this examination, the district court found (*id.* at 129a-130a) that the nondisclosure of the grand jury testimony did not violate *Brady* v. *Maryland, supra,* because there was nothing exculpatory in either that testimony or the cross-examination of Inspector Mullins based upon it.[6] The court also held that the government had not violated the Jencks Act, 18 U.S.C. 3500. Noting that that statute requires the production of a witness's statements relating to the subject matter of his direct testimony only upon motion of the defendant, the court found that "[n]o such motion was made" (Pet. App. 130a) and that, in any event,

[5]The prosecutor explained that he believed his oversight had been caused by the circumstances surrounding Inspector Mullins' direct examination (Pet. App. 54a-56a). At the district court's request, the scope of the government's direct examination of Inspector Mullins had been extremely limited, disclosing essentially that Mullins was the case agent responsible for coordinating the investigation and that, although surveillance cameras had been installed in the Registry Section after Short went to the postal authorities, they were not in operation on the day of the crime (see *id.* at 7a-12a). Following this testimony, the defense made no request for Inspector Mullins' Jencks Act materials. Petitioner then commenced cross-examination of Inspector Mullins and was permitted to go into matters beyond the scope of the direct examination (see *id.* at 13a-46a). In the course of this occurrence, the prosecutor neglected to carry out his intention to provide the defense with Inspector Mullins' grand jury testimony. The court eventually concluded that this failure had been negligent rather than intentional (*id.* at 134a).

[6]The court observed, moreover, that certain technical information supplied by Inspector Mullins to the grand jury had been equally available to petitioner, who was himself an experienced supervisory postal employee (Pet. App. 129a).

the grand jury testimony did not pertain to the subject of Inspector Mullins' direct testimony (*id.* at 130a-131a). Finally, the trial judge concluded that, even if petitioner had been entitled to the grand jury testimony, "beyond any reasonable doubt * * * this information could not have affected the verdict except [to] make a verdict of guilty more probable" (*id.* at 92a). The record amply supports this determination.

Inspector Mullins' grand jury testimony indicated, *inter alia,* that the ten mail parcels from Italy had arrived in the vault room of the Registry Section at 4:30 a.m. on September 22, 1975 (Pet. App. 111a). Petitioner contends (Pet. 20-22) that if he had been aware of this evidence he could have argued to the jury that the crime could not have occurred as Helton and Marchione had testified, because the parcels would have arrived as petitioner was returning from and Marchione and Helton were leaving for lunch. Since the time cards indicated that petitioner did not punch out again until his duty shift ended at 8:30 a.m., petitioner argues that he could not have spoken to Marchione about the parcels during the latter's lunch break.

Petitioner fails to note, however, that he made this same assertion to the jury at trial, based on the fact that Marchione went to lunch after petitioner had returned (and purportedly did not leave his work place again until 8:30 a.m.) (Tr. 544-546). The jury's verdict shows that it rejected the argument. But more important, the arrival of the packages from Italy at 4:30 a.m. was immaterial to whether petitioner had the conversation in question with Marchione. Petitioner's lunchroom discussion with Marchione referred to mail from Miami to the British West Indies, rather than from Italy, and nothing in the record suggests that the parcels going to the West Indies did not arrive considerably earlier than 4:30 in the morning. Moreover, the only evidence as to time of arrival of the parcels from Italy

concerned their receipt in the *vault room*, not their arrival at the Registry Section area that was under petitioner's general supervision. Finally, the evidence established that petitioner's time cards on the day in question were punched not by petitioner but by a technician on the basis of forms petitioner had subsequently submitted (Tr. 274-281). Thus, petitioner could have eaten lunch at a time other than he alleged or could have left the Registry Section at a time not indicated on his time card.[7]

Petitioner's further contention (Pet. 22-25) that Inspector Mullins' grand jury testimony would have permitted an argument that the parcels from Italy could not have been handled by Helton because they were insured rather than registered mail is similarly unavailing. Inspector Mullins told the grand jury that insured parcels from Italy are processed as registered mail (Pet. App. 109a). Accordingly, Helton would have assembled the parcels in question in a registered mail bag (*id.* at 68a).[8] In any event, the manifold bill and vault book entry prepared by Helton at

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[7]Contrary to petitioner's assertion (Pet. 21), the arrival of the parcels from Italy at 4:30 a.m. did nothing to undermine the government's claim that he had spoken to Marchione before learning that Helton was ready to cooperate. As the district court noted (Pet. App. 73a), the evidence indicated that petitioner enlisted Marchione's aid in the expectation that Helton would assemble a mail bag containing valuable items (whether from Italy or elsewhere). The fact that the mail bag she put together included the parcels from Italy was entirely fortuitous (*id.* at 71a).

[8]Although petitioner claimed during trial to have information refuting this testimony of Inspector Mullins (Pet. App. 69a), he has never attempted to elaborate upon or to support that claim. Moreover, during pretrial discovery, the prosecution had provided the defense with a post office logistics order reflecting that insured mail from Italy was to be processed as domestic registered mail (*id.* at 65a).

the time she put together the mail bag (G.X. 6, 7) clearly established that Helton had handled these parcels and thus corroborated her testimony at trial.

2. In January 1976, when petitioner sought to use $100,000 in cash as a down payment on the garden apartments he had purchased, the mortgagee requested that he convert the cash into a bank check (Tr. 291-294). In obtaining the check from the bank, petitioner executed an Internal Revenue Service form reflecting the transaction. Petitioner contends (Pet. 11-20) that the government intentionally withheld this form and that, if it had been provided, it would have created a reasonable doubt as to his complicity in the embezzlement because it would have indicated "a total lack of consciousness of guilt" (Pet. 17).

The district court correctly dismissed these claims as "without any substance at all" (Pet. App. 100a). Rather than being exculpatory, the I.R.S. form was further evidence of petitioner's involvement in the crime, since the last digit of the social security number on the form did not match petitioner's number. This discrepancy, as the court observed (*id.* at 84a), "would have been absolutely murderous" to the defense, because it would have tended to show that petitioner attempted to conceal his identity on the form (see *id.* at 120a).

Although at one point the trial judge suggested that the form should nevertheless have been produced (*id.* at 92a), he later concluded that the material was "so detrimental [to the defense] that [the nonproduction] really [did not] make any difference" (*id.* at 94a). Furthermore, the court correctly determined that the material was equally available to the defense and that there had been no "neglect on the part of

the government" in not producing it (*id.* at 126a).[9] As this Court remarked in *United States* v. *Agurs*, 427 U.S. 97, 109, n.16, quoting from *Giles* v. *Maryland*, 386 U.S. 66, 98 (Fortas, J., concurring), there is of course no *Brady* violation in failing to disclose material "otherwise known to the defense." See also *id.* at 103 (*Brady* rule "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense"); *United States* v. *Ross*, 511 F. 2d 757, 763 (C.A. 5), certiorari denied, 423 U.S. 836; *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2), certiorari denied, 412 U.S. 939.

Finally, as the district court noted (Pet. App. 128a), the evidence was merely cumulative of other evidence supporting petitioner's contention (which *was* presented to the jury, see Tr. 555-560) that his use of a substantial amount of cash in purchasing the apartment building was completely open and innocent. Accordingly, even if the form had been provided to petitioner and introduced at trial, it would not have created a reasonable doubt as to petitioner's guilt. *United States* v. *Agurs, supra*, 427 U.S. at 112-113.[10]

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[9]There is no merit to petitioner's allegation (Pet. 12, 15) that he made a specific demand for the form. The defense request concerned information regarding petitioner's assets obtained from banks with whom he had accounts (Pet. App. 31a-32a). The court inspected summary sheets compiled by the government from petitioner's bank records and concluded that the material was "work product information otherwise available to the" defense (*id.* at 32a). In sum, petitioner's general request for "whatever you've got" (*id.* at 31a) was the equivalent of no request at all. See *United States* v. *Agurs*, 427 U.S. 97, 107.

[10]Petitioner argues (Pet. 18-20) that virtually identical, conclusory affidavits obtained in *ex parte* interviews with several of the jurors (see Pet. App. 138a-148a) should have been considered by the district court in assessing the materiality of the I.R.S. form. As we have noted, since non-production of that form did not constitute a *Brady* violation, it was unnecessary to determine its materiality. However, the district court proceeded to do so and, applying an objective standard, concluded that the evidence did not create a reasonable doubt about petitioner's guilt. The court correctly held that Rule 606(b) of the Federal Rules of Evidence prevented consideration of the affidavits, but that, even if the affidavits had been admissible, it would have given them "no weight at all" (Pet. App. 131a). See generally *McDonald* v. *Pless*, 238 U.S. 264, 267; *Mattox* v. *United States*, 146 U.S. 140, 149.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

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